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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RICHARD W. BLAIR, ET AL.,

Petitioners,

v.

GLENN T. FREEMAN AND LUCY E. FREEMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I

WHETHER THE COURT BELOW ERRED IN HOLDING THAT THE APPLICABLE LAW, IN 1982 AND 1984, WAS "CLEARLY ESTABLISHED" SO THAT STATE OFFICIALS COULD REASONABLY BE SAID TO HAVE "KNOWN" THAT AN ADMINISTRATIVE INSPECTION OF A LICENSED COMMERCIAL ESTABLISHMENT, CONDUCTED PURSUANT TO A PERVASIVE REGULATORY SCHEME, WAS CONSTITUTIONALLY OBJECTIONABLE UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

II

WHETHER THE COURT BELOW ERRED IN HOLDING THAT PARRATT V. TAYLOR, 451 U.S. 527 (1981) AND HUDSON V. PALMER, 468 U.S. 517 (1984) DID NOT APPLY TO BAR A PROCEDURAL DUE PROCESS CLAIM GROUNDED UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN ONE STATE OFFICIAL, IN 1982, AND ANOTHER, TWO YEARS LATER, FAILED TO FOLLOW STATE STATUTORY PROCEDURES GOVERNING LICENSE SUSPENSIONS, WHICH PROVIDED FOR DUE PROCESS, AND AN ADEQUATE POST-DEPRIVATION REMEDY EXISTED.

III

WHETHER THE COURT BELOW ERRED IN HOLDING THAT THE APPLICABLE LAW, IN 1982 AND 1984 WAS "CLEARLY ESTABLISHED" SO THAT STATE OFFICIALS COULD REASONABLY BE SAID TO HAVE "KNOWN" THAT A PRE-DEPRIVATION HEARING WAS CONSTITUTIONALLY REQUIRED UNDER THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE BEFORE OFFICIALS COULD SUSPEND A COMMERCIAL ESTABLISHMENT LICENSE.

IV

WHETHER THE COURT BELOW ERRED IN HOLDING THAT THE RESPECTIVE SECRETARIES OF THE SOUTH DAKOTA DEPARTMENT OF HEALTH WERE NOT ABSOLUTELY IMMUNE FROM SUIT FOR THEIR DECISIONS, IN 1982 AND 1984, TO SUSPEND A COMMERCIAL ESTABLISHMENT LICENSE.

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Richard W. Blair, Douglas E. Kludt, Michael J. Baker, and Mark V. Meierhenry, with the exception of the latter, have been parties to this litigation from the beginning. Petitioners will be referred to by name or collectively as "Petitioners" or "defendants." Respondents, Glenn T. Freeman and Lucy E. Freeman have also been parties to this litigation from the beginning. They will be referred to by name or collectively as "Freemans," or "plaintiffs."

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit appears in the Appendix (A-1-48), and is reported as Freeman v. Blair, 793 F.2d 166 (8th Cir. 1986). The judgment of the Court of Appeals dated and filed June 4, 1986, also appears in the Appendix (A-49-50).

The opinions of the United States District Court for the District of South Dakota, Central Division, denying summary judgment and thereafter granting summary judgment are unreported. They appear in the Appendix, (A-51-61) and (A-62-74), respectively, as does the District Court's Order of Dismissal (A-75-76).

NO. 86-

IN THE
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OCTOBER TERM, 1986

RICHARD W. BLAIR, ET AL.,

Petitioners,

v.

GLENN T. FREEMAN AND LUCY E. FREEMAN,

Respondents.

The Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on June 4, 1986.

JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals for the Eighth Circuit was entered on June 4, 1986. A Petition for Certiorari was filed

within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. U.S. Const. amend. IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing a place to be searched and the person or things to be seized.

2. U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

3. S.D. Codified Laws Ann. ch. 34-18, which is set forth in Appendix B.

4. S.D. Codified Laws Ann. §§ 1-26-1 (1982) (1983), 1-26-16 (1966), 1-26-17 (1978), 1-26-17.1 (1978), 1-26-18 (1978), 1-26-18.1 (1976), 1-26-19 (1972), 1-26-19.1 (1972), 1-26-19.2 (1972), 1-26-20 (1966), 1-26-21 (1972), 1-26-22 (1978), 1-26-23 (1966), 1-26-24 (1972), 1-26-25 (1978), 1-26-26 (1975), 1-26-27 (1973), 1-26-28 (1966), 1-26-29 (1966), 1-26-30 (1978), 1-26-30.1 (1975), 1-26-30.2 (1975), 1-26-30.3 (1975), 1-26-30.4 (1982), 1-26-30.5 (1982), 1-26-31 (1979), 1-26-31.1 (1975) (1983), 1-26-31.2 (1977), 1-26-31.3 (1975), 1-26-31.4 (1982), 1-26-32 (1975) 1-26-32.1 (1975), 1-26-32.2 (1982), 1-26-32.3 (1982), 1-26-32.4 (1982), 1-26-33 (1977), 1-26-33.2 (1982), 1-26-33.3 (1982) 1-26-33.4 (1982), 1-26-33.5 (1982), 1-26-33.6 (1975), 1-26-34 (1966), 1-26-35 (1978), 1-26-36 (1978) (1983), 1-26-36.1 (1982), and 1-26-37 (1972) (1983), which are set forth in Appendix C.

5. S.D. Codified Laws Ann. §§ 21-32-15 (1981), 21-32-16 (1981), 21-32-17 (1983) and 21-32-18 (1984) which are set forth in Appendix D.

6. S.D. Admin. R. Chs. 44:02:03 and 44:02:04 (1980), which are set forth in Appendix E.

STATEMENT OF THE CASE

Glenn and Lucy Freeman own a farm in Jackson County, South Dakota and, since 1965, have operated the Belvidere East KOA Kampground (the campground). On July 27, 1982, Michael Baker, an Assistant Program Director for the South Dakota Department of Health (the Department), and another Department employee arrived at the campground and requested permission to inspect pursuant to S.D. Codified Laws Ann. §§ 34-18-24 (1982), 34-18-26 (1972), and S.D. Admin. R. chs. 44:02:03 and 44:02:04 (1980). Glenn Freeman, believing that the South Dakota statutes and regulations did not authorize enforcement of certain national codes, and fearing a biased inspection, refused to allow an inspection without a search warrant. The Department officials thereafter, departed without incident.

The following day, Baker wrote a memorandum to Richard Blair, the Secretary of the Department, recommending that the Freemans' campground license be summarily suspended until the safety and public health conditions of their campground could be determined, but also stated that he (Baker) would perform an inspection of the Freemans' campground under the authorization of a search warrant if Blair deemed this to be the acceptable procedure. Blair then contacted the State Attorney General's Office for advice. Attorney General Mark Meierhenry and Assistant Attorney General Douglas Kludt discussed the Freemans' refusal to allow the Department to inspect the campground. Meierhenry advised Kludt, after reviewing the applicable South Dakota statutes and regulations and discussing the matter with him, to represent the Department and if the Department wished to inspect, "to go do it."

Later that same day, Kludt met with Blair and discussed the Freeman matter. After doing so, Blair telephoned Glenn Freeman and set up an appointment to meet with the Freemans the following morning. During the telephone conversation with Blair, Glenn Freeman indicated that he would not allow an inspection of the Freemans' campground without a search warrant.

On the morning of July 30, 1982, Blair, Baker, and Kludt arrived at the campground and requested permission to conduct an inspection. When Glenn Freeman refused to allow an inspection unless the officials had a warrant, Blair served an order on the Freemans summarily suspending their campground license. On the advice of their attorney that the license suspension was improper, the Freemans continued to operate the campground. Amended license suspension orders were served on the Freemans over the

course of the next several days, setting a hearing date of August 9, 1982.

On August 6, 1982, Glenn Freeman called Kludt to complain about the short amount of time before the scheduled hearing. During the conversation, Glenn Freeman was advised that the Department would be amenable to rescheduling the hearing for a more reasonable time. Later in the conversation, Glenn Freeman consented to an inspection of his campground after receiving assurances from Kludt that he would get an "unbiased" inspector.

Four days after this conversation, Baker and another Department employee conducted, with the Freemans' consent, an inspection of their campground.

In March, 1983, the Freemans filed this suit alleging, inter alia that their rights under the Fourth and Fourteenth Amendments were violated by State officials. The

Freemans named as defendants the State of South Dakota, the Department, Governor William J. Janklow, Meierhenry, Blair, Kludt and Baker. The State of South Dakota and the Department voluntarily were dismissed as parties and the District Court dismissed Janklow and Meierhenry by motion.[1] The remaining defendants moved for summary judgment, contending that no search warrant was required prior to inspection and that the summary suspension of the campground license was proper. The district court held that summary judgment was inappropriate because "plaintiffs were well within their Fourth Amendment rights" to require a search warrant and that the due process claim arising from the summary suspension of the Freemans'

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[1]The District Court subsequently reinstated Meierhenry as a party.

license therefore survived. Freeman v. Blair, No. 83-3026, slip op. at 6-7 (D.S.D. Oct. 31, 1984) Appendix (A-59-61).

On August 29, 1984, two employees of the Department contacted the Freemans at their campground and requested permission to conduct another inspection. Glenn Freeman denied Department employees permission to inspect and the officials departed the Freemans' campground.

In a letter written the next day, Blair's successor, Lawrence Massa, requested the Freemans to set a convenient time for inspection. Glenn Freeman responded by letter, denying the Department access to the Freemans' campground without a search warrant. Subsequently, Massa, summarily suspended the Freemans' campground license on the ground that the "public health, safety and welfare imperatively required immediate action" and scheduled a hearing for

September 18, 1984, to review the circumstances of the summary suspension.

Eventually, after a postponement by mutual agreement of the parties, a hearing was held to a hearing examiner on October 3, 1984. The hearing examiner concluded that the South Dakota regulatory scheme was insufficient to support warrantless inspections and ordered the Freemans' campground license be reinstated.

On March 22, 1985, defendants again moved for summary judgment, claiming absolute and/or qualified immunity. The district court granted defendants' motion and dismissed the Freemans' complaint with prejudice. In do so, the court held that the defendants were entitled to qualified immunity and that Blair and Massa were entitled to absolute immunity from suit for their actions. Freeman v. Blair,

No. 83-3026, slip op. at 5-8 (D.S.D. April 25, 1985) Appendix (A-66-73).

The Eighth Circuit Court of Appeals reversed, concluding that neither qualified nor absolute immunity was applicable under the circumstances. Freeman v. Blair, 793 F.2d 166 (8th Cir. 1986) Appendix (A-13-46).

REASONS FOR GRANTING THE WRIT

I

QUALIFIED IMMUNITY--FOURTH AMENDMENT ISSUE

A. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

It is settled law that government officials performing discretionary functions are entitled to qualified ("good faith") immunity from suit as long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow

v. Fitzgerald, 457 U.S. 800, 818 (1982); see also Mitchell v. Forsyth, ___ U.S. ___, 105 S.Ct. 2806, 2818 (1985); Davis v. Scherer, ___ U.S. ___, 104 S.Ct. 3012, 3018-3019 (1984). Whether an official is entitled to qualified immunity depends in turn upon whether the applicable law was "clearly established" at the time of the alleged misconduct. Harlow v. Fitzgerald, 457 U.S. at 818.

> If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbid conduct not previously identified as unlawful . . . if the law was clearly established, immunity defense ordinarily should fail, since a reasonable competent public official should know the law governing his conduct.

Id. at 818-819.

The Eighth Circuit panel held that the applicable law in 1982 and 1984 was "clearly established" so that the Petitioners could

reasonably be said to have "known" that they were not entitled to inspect the Freemans' campground under the State's regulatory scheme without a search warrant. Freeman v. Blair, 793 F.2d at 174-176. In so holding, the panel observed that under Donovan v. Dewey, 452 U.S. 594 (1981), even if the commercial campground industry in South Dakota was "pervasively regulated", see United States v. Biswell, 406 U.S. 311 (1972), state officials were nonetheless prohibited by the Constitution from conducting warrantless inspections of the Freemans' campground because the State's regulatory scheme was not sufficiently defined to assure "certainty and regularity" and qualify as a "constitutionally adequate substitute for a warrant." Freeman v. Blair, 793 F.2d 175, quoting Donovan v. Dewey, 452 U.S. at 603. The panel interpreted Donovan v. Dewey, supra, to mean that a warrantless

inspection of a "pervasively regulated industry" was permissible only when it was conducted pursuant to a detailed inspection scheme that could act as a surrogate for a warrant. Such an interpretation, however, flies in the face of this Court's pronouncements in United States v. Biswell, supra.

In Biswell, a pawn shop operator claimed that the warrantless inspection of his business premises, although authorized by Section 923(g) of the Gun Control Act of 1968 (18 U.S.C. § 921, et seq.), violated his Fourth Amendment rights. This Court, however, upheld the inspection, despite the fact that § 923(g) failed to define the frequency or scope of inspection, and in addition, failed to provide any means by which an establishment owner's Fourth Amendment interests could be accommodated. See Donovan v. Dewey, 452 U.S. at 604-605.

Under the panel's holding in Freeman, the warrantless inspection at issue in Biswell would have been invalid since § 923(g) did not define either the frequency or scope of an inspection or provide a mechanism for accommodating Fourth Amendment interests, and therefore comply with the requirements set forth in Donovan v. Dewey, supra.[2] To say, as the panel does, that the

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[2]Interestingly, the Eighth Circuit, in United States v. Jamieson-McKames Pharmaceuticals, 651 F.2d 532 (8th Cir.) cert. denied, 455 U.S. 1016 (1981), upheld the warrantless inspection of a pharmacy conducted pursuant to § 704 of the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 374). In doing so, the Court found that the inspection fit within the Colonnade-Biswell exception to the warrant requirement despite the fact that § 704 did not limit the frequency or scope of the inspection or provide for a means by which an establishment owner could accommodate any special Fourth Amendment interests he might have. Significantly, the Jamieson-McKames Pharmaceuticals decision, although originally handed down approximately one month before

(Footnote Continued)

applicable law in 1982 and 1984 was "clearly established" and that it was unreasonable for the Petitioners to rely on Biswell for a basis for their warrantless inspections is both erroneous and unjustifiable and demands correction by this Court through a writ of certiorari.

B. UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Eighth Circuit panel's decision herein raises significant and reoccurring problems for state officials in the area of administrative inspections of licensed commercial establishments. This is

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(Footnote Continued)
the Dewey decision, was amended some seven weeks after Dewey was decided and specific reference to Dewey was included in the amended decision of the Court. See 651 F.2d at 539, n.10.

particularly the case since at least eleven other states have inspection schemes pertaining to campgrounds which, in substance, mirror the one found in South Dakota.[3]

More importantly, the panel's decision represents an erroneous and overly restrictive view of whether the applicable law concerning warrantless administrative inspections was, in 1982 and 1984, "clearly established." The following factors militate

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[3]Florida, Fla.Stat. § 573.052 (1984); Illinois, Ill.Rev.Stat. ch. 111½, §§ 768-772 (1985); Kentucky, 902 Ky. Admin. Regs. 15:020:15 (1975); Maine, Me. Rev. Stat. Ann. Tit. 22, § 2497 (1979); Montana, Mont. Code Ann. § 50-52-301 and 302 (1983), Mont. Admin. R. 16.10.704 (1982); Nebraska, Neb. Rev. Stat. § 71-3103 (1959); North Dakota, N.D. Cent. Code § 23-10-04 (1977); Ohio, Ohio Admin. Code § 3701-25-53 (1984); Oregon, O.R.S. § 446.335 (1981); Wisconsin, Wis. Admin. Code HSS 178.17 (1985); Wyoming, Mobile Home Park & Campground Regulations § 8 (1982).

against a finding that the applicable law was "clearly established" and make the panel's holding highly suspect:

> 1. Warrantless administrative searches/inspections of commercial property, conducted pursuant to a regulatory scheme, had, in 1982 and 1984, and have, since then, been upheld on numerous occasions in a wide variety of contexts, many involving inspections for potential health and safety hazards such as was the purpose for the inspections attempts here.[4]
>
> 2. Warrantless administrative inspections of licensed commercial establishments, made under a regulatory scheme, have, since 1967, been constitutionally resolved on a case-by-case basis under the Fourth Amendment standard of unreasonableness" (i.e., by balancing the State's interests with that of the establishment). See v. City of Seattle, 387 U.S. 541, 546 (1967); Colonnade Catering Corp. v. United States, 397 U.S. 72, 76-77; Marshall v. Barlow's, Inc., 436 U.S. 307, 321 (1978).

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[4]A list of citations appears in the Appendix F.

3. Warrantless administrative inspections of licensed commercial campgrounds in South Dakota were, in 1982 and 1984, specifically authorized by a presumptively valid regulatory scheme that had never been constitutionally tested in any state or federal court.

4. At the time, this Court had, for the most part, been particularly sensitive to the Fourth Amendment's broad statement of "reasonableness" where authorizing statutes permitted the challenged inspection or search. See Barlow's, 436 U.S. at 335, n.7 (Stevens, J., dissenting); Almeida-Sanchez v. United States, 413 U.S. 266, 290 (1973) (White, J., dissenting); United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

5. While a commercially licensed business at the time was unquestionably entitled to Fourth Amendment protection, nonetheless, such a business, by its nature and voluntary existence, could open itself to intrusions that would not be permissible in a purely private context. See G.N. Leasing Corporation v. United States, 429 U.S. 338, 353-354 (1977); see also, Colonnade, supra; Biswell, supra.

6. At the time, there could be no reasonable expectation of privacy in public areas of a commercial establishment such as a campground

subject to inspection. See Barlow's, 436 U.S. at 315; Donovan v. Lone Steer, 464 U.S. 408 (1984).

7. In the context of campgrounds, the State had, at the time, a strong and important interest in protecting, via inspection, the health and safety of those members of the general public using campgrounds. See Biswell, 406 U.S. at 315; Dewey, 452 U.S. at 601.

8. The South Dakota Legislature and the South Dakota Department of Health, by enacting S.D. Codified Laws Ann. §§ 34-18-24 (1982), 34-18-26 (1972), S.D. Admin.R. chs. 44:02:03 and 44:02:04 (1980), respectively, determined that the promotion of health and safety in campgrounds, was an urgent State interest requiring regulation and supervision, and further, that warrantless inspections were crucial to the accomplishment of these health and safety goals. See Biswell, 406 U.S. at 315-317; Barlow's, 436 U.S. at 329 and 333 (Stevens, J., dissenting).

9. The requirement of a search warrant as a predicate for conducting an administrative inspection would, at the time, have undermined the efficiency and effective enforcement of the South Dakota regulatory scheme. See Biswell, 406 U.S. at 315-316; Barlow's, 436 U.S. at 329-330

(Stevens, J., dissenting); Dewey, 452 U.S. at 602-603.

10. The South Dakota regulatory scheme was, at the time, specifically tailored to protect health and safety concerns unique to campground establishments, see S.D. Admin.R. ch. 44:02:03 (1980). See Dewey, 452 U.S. at 603.

11. The standards with which a South Dakota campground owner at the time was required to comply with were all specifically set forth in S.D. Admin.R. ch. 44:02:03 (1980), a copy of which was, and still is, furnished to all campground owners free of charge. See Dewey, 452 U.S. at 603-604.

12. In most campground inspection situations in South Dakota, at the time, there was little or no information available to authorities prior to inspection that would justify a warrant.

13. At the time, potential health and safety hazards from which the public must be protected could not be detected without entering the campground establishment, and for this reason, routine inspections were imperative so that these hazards would not escape attention. Compare, Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861, on remand, 35 Colorado App. 207, 534 P.2d 796, aff'd, 191 Colo. 455, 553 P.2d 811 (1974).

14. The OSHA regulatory scheme considered in Barlow's differed significantly from the South Dakota campground regulatory scheme at the time in the following respects:

a. Unlike the OSHA scheme which authorized the inspection of practically all of American industry, the South Dakota scheme at the time, was specifically limited to inspections of lodging, food service and campground establishments. See Dewey, 452 U.S. at 603.

b. In contrast to the OSHA scheme where the class sought to be protected was made up of employees who were in the work place itself and free to report violations at any time, the protected class under the South Dakota scheme at the time, was the general consuming public (i.e., tourists), who had no way of learning of violations short of illness or injury from using campground facilities containing health and safety hazards.

c. In Barlow's, the secretary's argument that

> a warrant requirement would impede enforcement was inconsistent with the fact that OSHA regulations promulgated by the secretary himself provided for obtaining warrants, even though the statute did not require it. Under the South Dakota scheme, however, there was, at the time, no similar regulation and thus nothing that was inconsistent with the stated needs of enforcement.

It follows from the foregoing, that the applicable law, as the district court held, was not so "clearly established" that Petitioners could reasonably be said to have been "plainly incompetent" or to have acted in "knowing violation" of the law. See Malley v. Briggs, ___ U.S. ___, 106 S.Ct. 1092, 1096-1097 (1986). Accordingly, review is necessary to correct the panel's decision below.

C. UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH THE

DECISIONS OF OTHER FEDERAL COURTS OF APPEAL AND STATE COURTS OF LAST RESORT ON THE SAME MATTER.

The Petitioners submit that the instant case is in conflict with the following decisions:

1. Lovgren v. Byrne, 787 F.2d 857 (3d Cir. 1986)

2. Peterman v. Coleman, 764 F.2d 1416 (11th Cir. 1985)

3. Rush v. Obledo, 756 F.2d 713 (9th Cir. 1985)

4. United States v. Kaiyo Maru No. 53, 699 F.2d 989 (9th Cir. 1983)

5. Wayne Cusimano, Inc. v. Block, 692 F.2d 1025 (5th Cir. 1982)

6. United States v. Gordon, 655 F.2d 478 (2d Cir. 1981)

7. United States v. Raub, 6337 F.2d 1205 (9th Cir.), cert. denied, 449 U.S. 922 (1980)

8. Frey v. Panza, 621 F.2d 596 (3d (Cir.), cert. denied, 449 U.S. 1035 (1980)

9. Pollard v. Cockrell, 578 F.2d 1002 (5th Cir. 1978)

10. United States ex rel. Terraciano v. Montange, 493 F.2d 682 (2d Cir.), cert. denied, 419 U.S. 875 (1974)

11. Pullin v. Louisiana State Racing Com'n., 4767 So.2d 683 (La. 1985), on rehg, 484 So.2d 105 (1986)

12. Glenwood TV, Inc. v. Ratner, 103 A.D.2d 322, 480 N.Y.2d 98 (1984), aff'd, 65 N.Y.2d 642 491 N.Y.S.2d 620, cert. denied, ___ U.S. ___, 106 S.Ct. 241 (1985).

13. Tallman v. Department of Natural Resources, 421 Mich. 585, 365 N.W.2d 724 (1984)

14. Moore v. State, 442 So.2d 215 (Fla. 1983)

15. State v. Kirkland, 655 S.W.2d 140 (Tenn. 1983)

16. In re Martin, 90 N.J. 295, 447 A.2d 1290 (1982)

17. Marcowitz v. Department of Public Health, 106 Ill. App.3d 422, 435 N.E.2d 1291 (1982)

18. State v. Tindell, 272 Ind. 479, 399 N.E.2d 746 (1980)

19. State v. Barnett, 389 So.2d 352 (La. 1980)

20. People V. Firstenberg, 92 Cal. App.3d 570, 155 Cal.Rptr. 80 (2d Dist. 1979), cert. denied, 444 U.S. 1012 (1980)

21. Hosto v. Brickell, 265 Ark. 147, 577 S.W.2d 401 (1979)

22. City of Indianapolis v. Wright, 267 Ind. 471, 371 N.E.2d 1298 (1978)

D. OTHER REASONS

Recently, this Court accepted jurisdiction in People v. Krull, No. 85-608 (certiorari granted March 24, 1986) (opinion below: Illinois v. Krull, 107 Ill.2d 107, 481 N.E.2d 703 (1985)) and in Anderson v. Creighton, No. 85-5020 (certiorari granted June 30, 1986) (opinion below: Anderson v. Creighton, 766 F.2d 1269 (8th Cir. 1985)) and docketed the cases of Lewis v. McMasters, No. 85-2005 (appeal filed March 24, 1986) (opinion below: (9th Cir. October 22, 1985), unpublished) and New York v. Burger, No. 86-80 (petition for certiorari filed July 18, 1986) (opinion below: People v.

Burger, 67 N.Y.2d 338, 502 N.Y.S.2d 702 (1986)). A review of the issues presented in these cases reveals that this Court could, in Krull, Creighton, McMasters or Burger decide the qualified immunity--Fourth Amendment issue raised herein. The Petitioners, as an alternative reason for granting the writ in the instant case, respectfully request that the Court do so.

II

PARRATT/HUDSON--DUE PROCESS ISSUE

A. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

The Freemans' Fourteenth Amendment claim revolves around the action taken to suspend their campground licenses in 1982 and 1984. According to the Freemans, Petitioners' failure to afford them notice and an opportunity to be heard prior to summarily suspending their campground licenses deprived

them of due process of law. The Eighth Circuit panel held that the Petitioners' acts were not "random and unauthorized" and refused to apply Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 517 (1984) to the Freemans' due process claim. The panel reasoned that because the Petitioners' were "senior-level officials" they knew and were responsible for the decisions to summarily suspend the Freemans' campground licenses. Freeman v. Blair, 793 F.2d at 177. The panel's opinion, however, conflicts with this Court's pronouncements in Parratt and Hudson.

In Parratt, a state prison inmate was deprived of a twenty-three dollar and fifty cent ($23.50) hobby kit that he had ordered because a prison official had negligently mishandled prison mail. This Court held that where deprivations of property occur as a result of the unauthorized failure of agents

of the state to follow established state procedure and it is therefore impossible for the state to provide a meaningful pre-deprivation hearing, due process is satisfied by the existence of an adequate post-deprivation state remedy. Parratt, 451 U.S. at 541. The Court, later, in Hudson, reaffirmed the Parratt holding and extended it to include an intentional deprivation of property by state employees acting under color of state law.

The Freemans, in the instant case, did not allege that the State procedures governing summary suspensions were inadequate or served to deprive them of a protected interest. Rather, they alleged that the Petitioners applied these procedures in an unauthorized way (i.e., arbitrarily and capriciously) to deprive them of their due process rights. Stated otherwise, the alleged deprivation, according to the

Freemans, did not occur as a result of some state procedure, but as a result of Petitioners' failure to comply with the statutory procedures dealing with the summary suspension of campground licenses contained in S.D. Codified Laws Ann. §§ 34-18-27 (1972) and S.D. Codified Laws Ann. § 1-26-29 (1966).

Significantly, the Freemans had available to them, at the time, a means of redress for their alleged deprivations which satisfied due process and entitled them to be made whole for any injuries they might have suffered through the negligence of Petitioners. This means, of course, was through S.D. Codified Laws Ann. ch. 21-32 which, at all times relevant here, permitted the Freemans to sue the Petitioners in common-law tort and recover damages to the extent of liability insurance coverage ($1 million). See Norgeot v. State, 334 N.W.2d 501 (S.D. 1983); Arndt v. Hannum

Trucking, 324 N.W.2d 680 (S.D. 1981). By making this remedy available to the Freemans, the State did all that due process in a case such as this required. See Parratt v. Taylor, supra; Hudson v. Palmer, supra; compare Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

Whether some or all of the Petitioners were "senior-level officials" and as such could have provided the Freemans with a pre-deprivation hearing, does not make Parratt/Hudson inapplicable, since from the point of view of the State, as opposed to the state officials themselves, the summary suspensions in 1982 and 1984 were "random and unauthorized acts." Hudson v. Palmer 468 U.S. at ___, 104 S.Ct. at 3204; see also, Holloway v. Walker, 790 F.2d 1170, 1173-1174 (5th Cir. 1986) (on petition for rehearing). Indeed, the State of South Dakota had no way of knowing that the Departments' secretaries,

in 1982 and 1984, would fail to follow, either in form or substance, the established state procedures before summarily suspending the Freemans' campground licenses and accordingly cannot be said to have been in a position to have provided for pre-deprivation due process. Id.

B. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL ON THE SAME MATTER.

In addition, the Eighth Circuit panel's decision, conflicts with the following decisions of other federal courts of appeal:

1. Holloway v. Walker, supra

2. Yats v. Jamison, 782 F.2d 1182 (4th Cir. 1986)

3. Gunz v. Morrissette, 772 F.2d 1395 (7th Cir. 1985)

4. Wilson v. Beebe, 770 F.2d 584 (6th Cir. 1985) (en banc)

5. Cohen v. City of Philadelphia, 736 F.2d 81 (3d Cir. 1984)

6. Vicory v. Walton, 721 F.2d 1062 (6th Cir. 1983)

7. Albery v. Reddig, 718 F.2d 245 (7th Cir. 1983).

C. UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Eighth Circuit's panel decision raises a significant and reoccurring question concerning the applicability of Parratt, Logan, and Hudson, which federal courts have struggled with for years. See R.A. Smolla, The Displacement of Federal Due Process by State Tort Remedies: Parratt v. Taylor and Logan v. Zimmerman Brush Co., U.Ill.F., 831 (1982). Specifically, the decision brings to the forefront the following unanswered question:

> What is a "random and unauthorized act?"

This Court has never defined what constitutes "random and unauthorized" conduct, as compared with conduct pursuant to and "established state procedure," and as a result, there has been a great deal of confusion and inconsistency among federal courts. Id.; Note, Unauthorized Conduct of State Officials Under the Fourteenth Amendment: Hudson v. Palmer and the Resurrection of Dead Doctrine, 85 Colum. L. Rev. 837 (1985). The time has come, therefore, for this Court to definitively resolve the issue.

III

QUALIFIED IMMUNITY--DUE PROCESS ISSUE

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Eighth Circuit panel held that the Fourteenth Amendment due process requirement of a pre-deprivation hearing in circumstances

such as existed here, was "clearly established" at the time and rejected Petitioners' qualified ("good faith") immunity defense. A close scrutiny of the applicable decisions of this Court, however, reveals that the state of the case law was not "clearly established" in 1982 and 1984, where, as here, State officials imposed interim license suspensions, pending prompt administrative hearings that would determine the issues at hand.[5] See Cleveland Board of Education v. Loudermill, ___ U.S. ___, 105 S.Ct. 1487 (1985); Hudson v. Palmer, supra; Parratt v. Taylor, supra; Barry v. Barchi,

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[5]It is undisputed that the Freemans, within several days of the 1982 and 1984 license suspensions, were given notice and an opportunity to challenge the suspensions in a contested case hearing as required by S.D. Codified Laws Ann. §§ 34-18-27 (1972) and 1-26-29 (1966), and that in 1984, a contested case hearing was held.

443 U.S. 55, 1979; Mackey v. Montrym, 443 U.S. 1 (1979); Dixon v. Love, 431 U.S. 105 (1977); see generally Anno., The Supreme Court's Views As To The Propriety Under Federal Constitution's Due Process Guarantees Of Summary Administrative Deprivation Of Property Interest, 69 L.Ed.2d 1044 (Supp. 1985). Instead, the case law at the time established that due process was a flexible concept, See Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 12 (1979), Morrissey v. Brewer, 408 U.S. 471, 481 (1972), and turned on a review of each individual case and a balancing of various factors to ascertain what process was due. Loudermill, supra; Mathews v. Eldridge, 424 U.S. 319 (1976); see generally, Rubin, Due Process and the Administrative State, 72 Cal. L.Rev. 1044 (1984). Accordingly, review is mandated not only to settle the conflict which exists between the panel's opinion and

this Court's decisions on the subject, but also, to rectify an erroneous view on the part of the panel as to the applicable law at the time.

IV

ABSOLUTE IMMUNITY ISSUE

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The federal appeals court panel, distinguishing Butz v. Economou, 438 U.S. 478 (1978), refused to extend absolute immunity to Blair and Massa for their decisions, in 1982 and 1984 respectively, to summarily suspend the Freemans' campground licenses. In doing so, the panel was "unable to discern how extending absolute to situations such as [the one at hand] would promote the underlying purposes of immunity" and could not perceive "how the absence of absolute immunity here would impede an executive

branch official's vigorous exercise of his office for proper purposes in the future or how it would be unfair to subject to liability an official who knew or reasonably should have known that his initial actions, from which the administrative proceedings flowed, were clearly improper." Freeman v. Blair, 793 F.2d at 172.

This Court has recognized that executive agency officials, in certain circumstances, are entitled to absolute immunity. Butz, supra. In Butz, this Court held that executive agency officials who are responsible for the decision to initiate an administrative proceeding were entitled to absolute immunity from liability. Id., 438 U.S. at 515-516. Justice White, writing for the majority, reasoned that a decision to initiate administrative proceedings against an individual is very much like the prosecutor's decision to initiate or move

forward in a criminal prosecution. Id., at 515.

Under the Butz decision, Blair and Massa were clearly entitled to absolute immunity from suit for their actions involving the suspension of the Freemans' campground licenses. First, Blair and Massa, in deciding to initiate summary suspension proceedings against the Freemans, were performing functions "analogous" to those of a prosecutor bringing a criminal prosecution. Id., at 515-516; see also, Mitchell v. Forsyth, ___ U.S. ___, 105 S.Ct. 2806 (1985); Imbler v. Pachtman, 424 U.S. 409 (1976). Their decision to institute such proceedings, just as a prosecutor's decision to institute criminal proceedings, was discretionary in nature.

Second, and contrary to the panel's perceptions, there was, at the time, a serious danger that the decision to summarily

suspend the Freemans' campground licenses would provoke a retaliatory response. The record plainly shows that the Freemans, and more particularly, Glenn Freeman, had a long-standing animosity against the Department and the State of South Dakota in general. This Court can take judicial notice, pursuant to Rule 201 of the Federal Rules of Civil Procedure, that Glenn Freeman has previously filed suit, counterclaimed or been a party to a suit against the State, its subdivisions, State officials and private business.[6] Blair and Massa, at the time,

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[6]For example, the Freemans, on August 1, 1985, filed an action against the Department and Massa alleging that certain statutes and regulations pertaining to campgrounds were invalid. Currently, the suit remains pending in the State Circuit Court. See Freeman v. Department of Health, et al., Jackson County Civ. #85-18. See also, South Dakota Department of Transportation v. Freeman, 378 N.W.2d 241 (S.D. 1985) (opposing the State

(Footnote Continued)

were therefore subject to an obvious risk of retaliation through vexatious litigation from the angry and vengeance-seeking Glenn Freeman over his campground establishment. Butz, supra, 438 U.S. at 515; Mitchell v. Forsyth, ___ U.S. at ___, 105 S.Ct. at 2813; Nixon V. Fitzgerald, 457 U.S. 731, 751-753 & n.32-33 (1982); Gray v. Bell, 712 F.2d 490, 497-498 & n.17, (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984). Without complete immunity, the threat of litigation from the Freemans, or at least from Glenn Freeman, would distort the Departments' secretary's discretion and effect the fearless and independent performance of his duties. Id.

(Footnote Continued)
Department of Transportation's attempt to acquire highway billboards by condemnation); Terminal Grain Corporation v. Freeman, 270 N.W.2d 806 (S.D. 1978) (counterclaim against grain company for libel and slander and malicious prosecution).

Third, the Freemans have no proper ground to complain about affording Blair and Massa absolute immunity because they were provided with a sufficient means of checking agency zeal. See Butz, supra at 438 U.S. at 516; Nixon v. Fitzgerald, 457 U.S. at 757-758; Mitchell, supra, ___ U.S. at ___, 105 S.Ct. at 2814; Gray v. Bell, 712 F.2d at 498 & n.18. The record plainly shows that in both 1982 and 1984, the Freemans were given an opportunity to test the legality of the inspection and suspension acts, if they so desired, in a contested case hearing, and to appeal the decision to the circuit court and the State Supreme Court.

Finally, since, as demonstrated, the applicable law at the time was not "clearly established" neither Blair nor Massa could reasonably be said to have "known" that their initial actions, from which the administrative proceedings flowed, were

improper. Their decisions to suspend the Freemans' campground licenses clearly fell within the type of action rendered immune by Butz, and hence, completely protected them from suit in this case. By holding to the contrary, the Eighth Circuit has placed itself in conflict with this Court's pronouncements in Butz and of other Supreme Court cases dealing with the subject. Accordingly, the writ of certiorari should be granted.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Dated this 2nd day of September 1986.

Respectfully submitted,

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86-364

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NO. 86-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RICHARD W. BLAIR, ET AL.,

Petitioners,

v.

GLENN T. FREEMAN AND LUCY E. FREEMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-5169

Glenn T. Freeman and Lucy E. Freeman, individually and d/b/a Belvidere East KOA Kampground,	*	
Appellants,	*	
v.	*	
Richard W. Blair, individually and in his capacity as Secretary of Health, State of South Dakota; Douglas E. Kludt, individually and in his capacity as Assistant Attorney General, State of South Dakota; Michael J. Baker, individually and in his capacity as Assistant Program Director, Department of Health, State of South Dakota; John Does "A" through "K" whose true names are not known, but are	*	Appeal from the United States District Court for District of South Dakota

believed to be officers, agents or employees of the State of South Dakota,

Appellees.

Submitted: February 11, 1986

Filed: June 4, 1986

Before HEANEY and BOWMAN, Circuit Judges, and TIMBERS,* Senior Circuit Judge.

*The HONORABLE WILLIAM H. TIMBERS, Senior United States Circuit Judge for the United States Court of Appeals, Second Circuit, sitting by designation.

BOWMAN, Circuit Judge.

Plaintiffs-appellants Glenn and Lucy Freeman filed this section 1983 action against various officials of the state of South Dakota in their official and individual capacities. The Freemans allege that the license to operate their campground was summarily suspended when they refused to submit to an administrative inspection of the premises without a warrant. The Freemans claim that their rights under the Fourth and Fourteenth Amendments were violated. The District Court granted defendants' motion for summary judgment, concluding that the defendants were entitled to absolute or qualified immunity from suit for their actions. We reverse.

I.

The Freemans own a small farm in Jackson County, South Dakota and, since 1965, have operated the Belvidere East K.O.A.

Kampground (the campground). On July 27, 1982, Michael Baker, Assistant Program Director for the South Dakota Department of Health (the Department of Health or the Department), and another Department employee arrived at the campground and requested permission to conduct an inspection, citing two sections of the South Dakota Codified Laws as their authority to do so without a search warrant. The Freemans refused to allow the inspection without a warrant, believing that there was insufficient statutory authority for at least part of the proposed search and that the inspection would not be conducted fairly. The Department officials departed without incident.

The following day, Baker wrote a memorandum to Richard Blair, the Secretary of the Department, recommending suspension of the Freemans' campground license unless Blair thought that a search warrant was necessary.

Blair contacted the state attorney general's office for advice. Attorney General Mark Meierhenry and Assistant Attorney General Douglas Kludt reviewed the South Dakota statutes and Kludt subsequently met with Blair and advised him that no warrant was necessary to inspect the Freemans' property. Blair then called the Freemans and arranged an appointment for the following morning although the Freemans indicated that they still would require a search warrant.

On the morning of July 30, 1982, Blair, Baker, and Kludt arrived at the campground and requested permission to conduct an inspection. When the Freemans refused to allow the inspection unless the officials had a warrant, Blair served an order on the Freemans summarily suspending their

campground license.[1] On the advice of their attorney that the license suspension was improper, the Freemans continued to operate the campground. Amended license suspension orders were served on the Freemans over the course of the next several days, setting a hearing date of August 9. On August 6, Glenn Freeman called Kludt to complain about the short amount of time before the scheduled hearing. During the conversation, Kludt made some reference to possible criminal prosecution for the Freemans' failure to submit to an inspection and for continuing to operate despite the license suspension.

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[1]Section 34-18-27 of the South Dakota Codified Laws provides the secretary of health authority to summarily suspend a license upon determining the existence of a hazardous condition. See infra at 17. Blair admitted that he knew of no statutory or regulatory violations at the Freemans' campground that would constitute such a hazard.

Kludt evidently was willing to reschedule the hearing if the Freemans would cease operation. Because of these and other considerations, the Freemans consented to an inspection. See Kludt Deposition, exhibit 4 (transcript of telephone conversation).

In March 1983, the Freemans filed this suit alleging, inter alia, that their rights under the Fourth and Fourteenth Amendments had been violated by state officials.[2] The Freemans named as defendants the State of South Dakota, the South Dakota Department of Health, Governor William Janklow, Meierhenry, Blair, Kludt, and Baker. The State of South

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[2]Violation of parallel provisions of the South Dakota state constitution also were pled. Although these claims fall within the ancillary jurisdiction of the federal courts, we will not discuss them here as no authority under state law has been presented to this Court and questions concerning interpretation of state law are best left to the district courts in the first instance.

Dakota and the Department of Health voluntarily were dismissed as parties and the District Court dismissed Janklow and Meierhenry upon defendants' motion.[3] The remaining defendants moved for summary judgment, contending that no search warrant was required prior to inspection and that the summary suspension of the campground license was proper. The District Court held that summary judgment was inappropriate because "plaintiffs were well within their Fourth Amendment rights" to require a search warrant and that the due process claim arising from the summary suspension of the Freemans' license therefore survived. Freeman v. Blair, No. 83-3026, slip op. at 6-7 (D.S.D. Oct. 31, 1984).

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[3]The District Court subsequently reinstated Meierhenry as a party.

On August 29, 1984, two days before defendants moved for summary judgment, two employees of the Department appeared at the Freemans' campground desiring to conduct another inspection. The previous scenario replayed itself with the Freemans requesting a search warrant and the new Secretary of the Department of Health, Lawrence Massa, summarily suspending the Freemans' license on the ground that the "public health, safety and welfare imperatively required immediate action." Third Amended Complaint, Exhibit G.[4]

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[4]Section1-26-29 of the South Dakota Codified Laws requires a finding to this effect before a license may be summarily suspended. See infra note 10, at 17. After the 1984 suspension order was issued, the Freemans requested an administrative hearing concerning the inspection and license suspension, which was held on October 3, 1984. The hearing examiner concluded, as had the District Court, that the South Dakota statutory scheme was insufficient to support warrantless inspections.

On March 22, 1985, defendants again moved for summary judgment, claiming absolute and/or qualified immunity. The District Court granted defendants' motion and dismissed the Freemans' complaint with prejudice. The court held that Blair and Massa were entitled to absolute immunity under Butz v. Economou, 438 U.S. 478 (1978), because their decisions to initiate administrative proceedings were "analogous" to a prosecutor's decision to commence prosecution. Freeman v. Blair, No. 83-3026, slip op. at 7-8 (D.S.D. April 25, 1985). The court also concluded that the remaining defendants were entitled to qualified immunity. Id. at 5-6. Reviewing the precedents concerning warrantless administrative searches, the court found that "it was [not] unreasonable for defendants, in 1982 and September, 1984, to assume that they were entitled to inspect [the Freemans']

campground without a search warrant. . . . It follows from this that defendants are also entitled to qualified immunity" as to the license suspension claims. Id. at 5. The court observed that the Freemans were offered a hearing within several days of the suspension and indicated that this comported with the requirements of due process. Id. at 6.

II.

The Freemans urge reversal on the basis that defendants Blair and Massa are not entitled to absolute or qualified immunity nor are any of the remaining defendants entitled to qualified immunity. In reviewing a district court's entry of summary judgment, this Court employs the same standard that a district court utilizes to test the motion initially. Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). All evidence must be viewed in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences derived from the evidence. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970). Summary judgment is particularly illicited to resolve questions in which "intent, good faith and other subjective feelings play dominant roles." In re Coordinated Pre-trial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180, 185 (8th Cir. 1976) (citation omitted), cert. denied, 429 U.S. 1040 (1977). With this standard in mind, we look to the legal framework governing absolute and qualified immunity.

A.

We begin with the proposition that "qualified immunity represents the norm" for officials of the executive branch of government. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). This is so whether the suit is one against federal officials, as in Harlow, or one against state officials. Id. at 818 n.30; Butz v. Economou, 438 U.S. 478, 504 (1978). The Supreme Court in Butz stated that "officials who seek absolute exemption from personal liability or unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope" because of some "special function[]" that the officials serve. 438 U.S. at 506, 508.

Among the "special functions" that create absolute immunity, the Court in Butz included "agency officials performing certain functions analogous to those of a

prosecutor." Id. at 515. Justice White, writing for the majority, explained that executive branch officials need absolute immunity in this situation because "[t]he decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution" and that the discretion of the responsible officials "might be distorted" in the absence of complete immunity. Id. Defendants Blair and Massa argue that they are entitled to absolute immunity under this rationale for their decisions to suspend the Freemans' license since the license suspension was the first step of an administrative proceeding. We disagree.

Although there is a facial similarity between the factual setting here and the one in Butz, we believe that Blair's and Massa's

administrative proceedings distinguish this case from Butz. Before any administrative proceedings of the type contemplated in Butz occurred, the Department, with the explicit approval of Blair in 1982 and Massa in 1984, decided to conduct an inspection of the Freemans' campground. This is not the type of action that the Court in Butz contemplated as generating prosecutorial-type immunity. That type of immunity was reserved for instances in which the proceedings have "the characteristics of the judicial process," Id. at 512, a conclusion not easily arrived at in regard to a decision to inspect. Instead, we view the decisions to inspect, and more particularly to inspect without a warrant, as ones that were not attended by any of the characteristics normally associated with the judicial process. These decisions are analogous to the kind of administrative or investigative functions for which courts

ordinarily do not extend absolute immunity to prosecutors rather than analogous to the kind of function for which a prosecutor would be absolutely immune. See, e.g., Gray v. Bell, 712 F.2d 490, 498-99 & n.19 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984); Stepanian v. Addis, 699 F.2d 1046, 1048 (11th Cir. 1983); Mancini v. Lester, 630 F.2d 990, 992-94 (3d Cir. 1980); Marrero v. City of Hialeah, 625 F.2d 499, 506-10 (5th Cir. 1980), cert. denied, 450 U.S. 913 (1981); Daniels v. Kieser, 586 F.2d 64, 67-68 (7th Cir. 1978), cert. denied. 441 U.S. 931 (1979); see also Harlow, 457 U.S. at 811 n.16.[5]

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[5]Keating v. Martin, 638 F2d 1121 (8th Cir. 1980), is not to the contrary. In Keating, this Court held that prosecutors and their investigative assistants were immune for their actions, including the dismissal of charges against an informant apparently in

(Footnote Continued)

This conclusion, however, does not end our inquiry. The question remains whether Blair and Massa should be absolutely immune for their decisions to suspend the Freemans' license, notwithstanding that they are not entitled to complete immunity for decisions to inspect without a warrant. Although we normally would view the license suspension as the initiation of administrative proceedings entitling Blair and Massa to absolute immunity, we believe that other

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(Footnote Continued)
return for testimony against the plaintiff, "so long as the actions complained of appear to be within the scope of prosecutorial duties." Id. at 1122. The actions in Keating were designed to aid in the prosecution of the plaintiff and thus were the type of "quasi-judicial" functions for which courts typically grant immunity. Keating therefore simply does not address the question of prosecutorial immunity for administrative and investigative actions affecting a complaining party.

considerations counsel that absolute immunity is not warranted in these circumstances.

In Nixon v. Fitzgerald, the Supreme Court instructed that "[i]n defining the scope of an official's absolute privilege," courts must recognize "that the sphere of protected action must be related closely to the immunity's justifying purposes." 457 U.S. 731, 755 (1982). The purposes of prosecutorial immunity, to which an analogy is made here, are found in the desire to insure that the prosecutor may exercise his office with the vigor required to assure the public good and in the desire to prevent the injustice of subjecting to liability public officials who must exercise some discretion because of the legal obligations of their positions. See Imbler v. Pachtman, 424 U.S. 409, 422-27 (1976); Scheuer v. Rhodes, 416 U.S. 232, 240 (1974). In particular, the immunity is intended to forestall the

"serious danger that [a] decision to authorize proceedings will provoke a retaliatory response." Butz, 438 U.S. at 515; see generally Gray v. Bell, 712 F.2d at 497-502.

We do not perceive these dangers here and see no reason to extend absolute immunity in the instant circumstances. The decisions to inspect without a warrant clearly were functions for which Blair and Massa are not entitled to absolute immunity nor, as we conclude below, were the decisions reasonable under clearly established law. Yet it is precisely these decisions which generated all of the remaining actions for which absolute immunity now is claimed. We are unable to discern how extending absolute immunity to situations such as this one would promote the underlying purposes of the immunity. See Nixon, 457 U.S. at 755. It is unclear to us how the absence of absolute immunity here

would impede an executive branch official's vigorous exercise of his office for proper purposes in the future or how it would be unfair to subject to liability an official who knew or should have known that his initial actions, from which the administrative proceedings flowed, were clearly improper. Therein lies the distinction between this case and Butz. In Butz, the defendants' actions were proper on their face but may have been taken for impermissible reasons; in the instant case, the initial actions taken by defendants were improper and therefore cannot justify the remainder of their actions. Moreover, as the Court noted in Butz:

> It makes little sense to hold that a Government agent is liable for [his actions], but that an official of higher rank who actually orders such [actions] is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of

> lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.

438 U.S. at 505-06. These sentiments aptly fit this case as well.

B.

We are thus left with the question of whether the state officials participating in the actions complained of are entitled to qualified immunity. The Supreme Court has held that "[e]ven defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard." Davis v. Scherer, 104 S.Ct. 3012, 3018 (1984). The standard applicable to this case was set forth in Harlow. The Court stated in Harlow that

"government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. Subsequently, the Court made clear that qualified immunity for a constitutional violation is not defeated merely because an official's conduct violates some statutory or administrative provision. Davis. 104 S.Ct. at 3019-20. Thus, the only relevant question regarding immunity is whether the law allegedly violated was clearly established at the time of the conduct at issue. See id. at 3021; Harlow, 457 U.S. at 818. If the law was clearly established, "a reasonably competent public official" is presumed to know the law governing his conduct and the immunity defense should fail. 457 U.S. at

818-19. As the Court has noted, this standard "gives ample room for mistaken judgments" and protects "all but the plainly; incompetent or those who knowingly violate the law Malley v. Briggs, 106 S. Ct. 1092, 1097, 1096 (1986).

We now turn to a brief examination of the Freemans' claims. Our task then will be to determine whether the law in the areas implicated in those claims was clearly established at the time of the actions here at issue and thus whether the state officials' qualified immunity defenses should fail.

III.

We first observe that pro se complaints and supporting documents of the type now before us are entitled to indulgence upon review. See Hughes v. Rowe, 449 U.S. 5, 12-13. (1980). The Freemans' third amended complaint contains four counts. Count One

alleges that defendants knew or should have known that, under the Fourth and Fourteenth Amendments to the United States Constitution, a warrant was required to inspect the campground premises. Count One further alleges that defendants deprived the Freemans of their right to due process "by arbitrarily and capriciously" suspending their campground license because of their refusal to submit to a warrantless search. Thus, the latter allegation is one which in essence raises a claim of retaliation for the assertion of constitutional rights. Count Two contains claims under the South Dakota Constitution parallel to those of Count One. For the reasons expressed earlier, we do not address these claims separately. See supra note 2, at 4.

Count Three complains of defendants' failure to give the Freemans notice of the license suspension and an opportunity to be

heard prior to the actual suspension of the license as allegedly required by the Fourteenth Amendment and the relevant provision of the South Dakota Constitution. The Freemans also assert that these actions were taken "as punishment for [their] refusal to submit to a warrantless inspection." Third Amended Complaint, ¶ 45. Finally, Count Four is directed only at Attorney General Meierhenry. The Freemans allege that Meierhenry knew or should have known of the necessity to obtain a search warrant prior to inspecting the campground premises and of the necessity to give notice and an opportunity to be heard prior to suspending the Freemans' license. Nevertheless, according to the complaint, Meierhenry deliberately failed to inform the other defendants of these requirements and aided and abetted the other defendants in summarily suspending the

Freemans' license in retaliation for the assertion of their Fourth Amendment rights.

We view the Freemans' complaint as raising the question of whether the law was clearly established in three separate areas: (1) warrantless administrative searches; (2) due process requirements relating to license suspensions; and (3) retaliatory actions in response to the assertion of constitutional rights. Because we believe that Count Four merely reiterates the allegations already contained in Counts One and Three, we are convinced that these three categories encompass the entirety of the Freemans' claims. We will address each area in turn below.

A.

Defendants contend that it was reasonable for them to assume in 1982 and 1984 that a warrantless administrative inspection of the Freemans' campground

pursuant to the South Dakota statutory scheme was permissible. Defendants argue that the courts widely have upheld warrantless administrative searches of commercial property and observe that whether a warrantless inspection is proper is determined on a case-by-case basis. See v. City of Seattle, 387 U.S. 541, 546 (1967). While the latter contentions may be accurate, we believe that the law in this area was clearly established by 1982 and thus are unable to agree with defendants that it was reasonable for them to assume that they properly could conduct warrantless searches of the Freemans' property.

The law has been settled for some time that administrative inspections of private commercial property are subject to the strictures of the Fourth Amendment. Id. at 543. Searches of commercial property no less than of residential property generally are

unreasonable unless authorized by a valid search warrant. See Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978); Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967). Because the expectation of privacy is significantly different between commercial and residential property, however, "legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment." Donovan v. Dewey, 452 U.S. 594, 598 1981). Even so, a warrant is required to conduct an inspection "unless some recognized exception to the warrant requirement applies." Barlow's 436 U.S. at 313.

The Supreme Court has recognized exceptions to the search warrant requirement in the case of "'pervasively regulated business[es],' United States v. Biswell, 406 U.S. 311, 316 (1972), and for 'closely

regulated' industries 'long subject to close supervision and inspection.' Colonnade Catering Corp. v. United States, 397 U.S. 72, 74, 77 (1970)." Barlow's, 436 U.S. at 313. The Court explained that "[t]he element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." Id. When the legislature "has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the . . . regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes" a warrant may not be required by the Constitution. Dewey, 452 U.S. at 600. Defendants assert that the commercial campground industry in

South Dakota is an industry of the type subject to this exception and that anyone who decided to engage in that business "could not help but be aware that his campground would be subject to effective inspections." Brief for Appellee at 25.

Even were we to conclude that the South Dakota commercial campground business is the type of "pervasively regulated" enterprise that the Court had in mind for this exception, the South Dakota statutes also would have to provide sufficiently detailed guidelines to assure the "certainty and regularity" of the warrantless inspections to qualify as a "constitutionally adequate substitute for a warrant." Dewey, 452 U.S. at 603. The Court has explained that warrantless inspections are constitutionally inadequate "if their occurrence is so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real

expectation that his property will from time to time be inspected by government officials." Id. at 599 (citing Barlow's, 436 U.S. at 323). Likewise, if the statutory scheme authorizes inspections but the legislature "made no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." Dewey, 452 U.S. at 599 (quoting Colonnade, 397 U.S. at 77). In these instances, a warrant is necessary to insure that reasonable standards for conducting inspections exist and to protect commercial property owners from the "almost unbridled discretion [of] executive and administrative officers . . . as to when to search and whom to search." Barlow's, 436 U.S. at 323.

The statutory authority relied upon by defendants consists of sections 34-18-24 and 34-18-26 of the South Dakota Codified Laws.

Section 34-18-24 directs the secretary of health to "periodically inspect or cause to be inspected every . . . campground operating within this state for compliance with the provisions of this chapter and the rules and regulations of the department of health." Section 34-18-26 grants the secretary "the right of entry and access to all areas . . . at any reasonable time" for purposes of conducting the inspection required by section 34-18-24. Because we conclude that these provisions for warrantless administrative inspections do not meet the clearly established standards set forth above, we need not decide whether the commercial campground industry would fall within the Colonnade-Biswell exception.[6]

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[6]Defendants assert that the South Dakota legislature had determined that warrantless

(Footnote Continued)

A cursory review of the statutes quoted above reveals that they do not comply with the requirements set forth in Dewey and its

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(Footnote Continued)
inspections were crucial to the objectives of health and safety in campgrounds and that requiring a search warrant would undermine efficient and effective enforcement of the regulatory scheme. This may be so but these considerations do not obviate the need to comply with constitutional requirements for the enforcement of regulatory schemes of this nature. Further, as the Court observed in Barlow's:

> For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." A warrant showing that a specific business had been chosen for . . . [a] search on the basis of a general administrative plan for the enforcement of [a statutory scheme] derived from neutral sources . . . would protect an employer's Fourth Amendment rights.

436 U.S. at 320-21 (citations omitted).

precursors. The direction to inspect "periodically" does not "specifically define[] the frequency of inspection," Dewey, 452 U.S. at 604, and is so "unpredictable that the owner, for all practical purposes, has no real expectation that his property will . . . be inspected by government officials." Id. at 599.[7] Moreover, the

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[7]The parties also contest whether inspections conducted by the Department in the past in fact have been regular and predictable. Defendants contend that campgrounds in South Dakota were inspected an average of once every 14.8 months between the years of 1970 and 1985. The Freemans on the other hand assert that their campground has been inspected irregularly. They argue that the campground was inspected only in 1974, 1980, and 1982. If the statute were not deficient on its face, this dispute would more appropriately be resolved by the finder of fact than by summary judgment. We note, however, that the relevant question would be whether the Department had inspected the particular establishment, i.e., the Belvidere East K.O.A., on a sufficiently certain and regular basis. See Dewey, 452 U.S. at 603; Barlow's, 436 U.S. at 320-21.

authority granted by section 34-18-26 to inspect "all areas . . . at any reasonable time" is given without providing executive branch officials and administrators any standards to govern the selection of businesses to search or the procedures to follow in conducting those searches. Cf. Barlow's, 436 U.S. at 320-21. We need not explore the adequacy of the South Dakota statutory scheme any further because we are certain that this authority is so broad that "the Fourth Amendment and its various restrictive rules apply." Colonnade, 397 U.S. at 77.[8] We believe that this

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[8]The Freemans' complaint also may state a claim under section 1983 for violation of the Fourth Amendment if their consent to the search conducted in 1982 was obtained by threats of criminal prosecution or other means of coercion. Cf., Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973); Bumper v. North Carolina, 391 U.S.

(Footnote Continued)

conclusion follows from what was clearly established law at the time Blair and Massa were facing their decisions. Since they are presumed to know the law governing their conduct, Harlow, 457 U.S. at 818-19, their claims of immunity must prevail.[9]

B.

(Footnote Continued)
543, 548 (1968). Because the parties have not briefed this issue, we do not analyze it separately. This matter will be an appropriate subject for review before the District Court on remand should the parties wish to raise it.

[9]Defendants also argue that because the constitutional adequacy of the South Dakota statutes had never been weighed by any court, they were entitled to rely on the presumptive validity of the statutes. Had the requirements for a valid statutory scheme of the type at issue in this case not been already well established, we might agree. Given the extensive exposition by the Supreme Court concerning the requisites for this type of legislative scheme, however, we are unable to agree. This is particularly the case since in effect the constitutional adequacy of these statutes was questioned by the Freemans and therefore brought to the attention of the relevant state officials.

Procedural due process limits governmental actions depriving individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fourteenth Amendment. Mathews v. Eldridge, 424 U.S. 319, 332 (1976). Section 34-18-27 of the South Dakota Codified Laws provides that "[t]he secretary of health, upon determining the existence of a hazardous condition that may immediately endanger human life or be seriously detrimental to public health[,] may . . . summarily suspend the license of any . . . campground . . . in this state."[10] Defendants do not contend that

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[10]Section 1-26-29 states that "[i]f the agency finds that public health, safety, or welfare imperatively require emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined."

procedural due process is inapplicable to suspensions of state-granted occupational or business licenses. Rather, defendants, citing Parratt v. Taylor, 451 U.S. 527 (1981), and Hudson v. Palmer, 104 S. Ct. 3194 (1984), assert that because the actions in issue were "unauthorized," due process was satisfied by the existence of an adequate postdeprivation remedy under state law.

In Parratt, a state employee negligently lost a prison inmate's hobby kit. The Court concluded that the prisoner had suffered a deprivation of property within the meaning of the Fourteenth Amendment but held that "takings of property without any predeprivation process" are permissible under the due process clause when the loss is the "result of a random and unauthorized act by a state employee" rather than "a result of some established state procedure." 451 U.S. at 541. This conclusion followed from the

recognition that it was "not only impracticable, but impossible" for a state to provide a meaningful hearing before that type of deprivation takes place. Id. The Court determined that the availability of a meaningful post-deprivation hearing satisfied the requirements of procedural due process because there were state remedies that could have fully compensated the plaintiff, even though those remedies may not have been as extensive as the remedies available under section 1983. Id. at 537-44. In Hudson, the Court extended this rationale to intentional as well as negligent deprivations of property. 104 S.Ct. at 3204.

The Freemans' complaint asserts that defendants violated their due process rights "by arbitrarily and capriciously suspending [their] license" because they refused to submit to the warrantless searches. See

Third Amended Complaint, ¶¶ 35-36. Defendants contend that the Freemans are complaining about unauthorized application of state procedures on the part of defendants, to wit, that defendants failed to comply with the statutory procedures governing summary suspension of campground licenses set forth in section 34-18-27. Defendants argue, therefore, that it was impossible for the State to provide a predeprivation hearing because the State could not have predicted the unauthorized acts of its employees in failing to follow the statutory guidelines. Thus, they conclude that Parratt and Hudson indicate that no predeprivation hearing was required in these circumstances because state

law provides the Freemans with an adequate remedy.[11]

We reject this argument. Our Court recently has observed that "Parratt . . . applies only if a determination has been made that a predeprivation hearing is not required." Littlefield v.City of Afton, 785 F.2d 596, 600 (8th Cir. 1986). In Logan v. Zimmerman Brush Co., the Supreme Court reiterated that "absent 'the necessity of quick action by the State or the impracticality of providing any predeprivation process,' a postdeprivation hearing . . . would be constitutionally inadequate." 455 U.S. 422, 436 (1982) (quoting Parratt, 451 U.S. at 539). We are unable to conclude that providing a

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[11]Chapter 21-32 of the South Dakota Codified Laws provides a cause of action against state officials in common law tort.

predeprivation hearing here was "impracticable." Surely decisions made by the highest officials in the executive branch of state government who have final authority over matters for which they are responsible do not constitute "random and unauthorized" acts. See Pembaur v. City of Cincinnati, 106 S. Ct. 1292, 1299 (1986) ("If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood."); Giglio v. Dunn, 732 F.2d 1133, 1137 (2d Cir.) (Cardamone, J., dissenting), cert. denied, 105 S. Ct. 328 (1984). The state officials in this case who decided to search the Freemans' campground without a warrant and to suspend the Freemans' campground license when they refused to submit to that search were senior-level officials. These officials knew

what actions were going to be taken because they were responsible for making the decisions. Consequently, a predeprivation hearing easily could have been provided.[12]

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[12]In addition, the cases of Bell v. Burson, 402 U.S. 535 (1971), and Mackey v. Montrym, 443 U.S. 1 (1979), both dealing with the suspension of driving privileges, lend support to the judgment that a predeprivation hearing was necessary here. In Bell, the Court found that due process necessitated a hearing before a person's driver's license could be suspended under a statute requiring any driver involved in an accident to furnish security6 or proof of financial responsibility" of a judgment against the person was likely. Id. In Mackey, the Court upheld a statute requiring suspension of a person's license for failing to submit to a blood-alcohol test. The statute provided for a prompt post-suspension hearing to ascertain whether the suspension was justified. The Court, applying Mathews v. Eldridge, 424 U.S. 319 (1976), determined that the governmental interest in protecting the public from drunk drivers outweighed the potential for an erroneous deprivation of a person's license without a pre-suspension hearing. 443 U.S. at 17, 19. In essence, the result in both cases hinges largely on the likelihood of an erroneous deprivation. We believe that that likelihood here is sufficiently great,

(Footnote Continued)

Defendants also contend, somewhat inconsistently, that instead of their actions being "unauthorized," it was reasonable for them to conclude that "their inability to conduct a warrantless inspection . . . [indicated] that a hazardous condition existed." Brief for Appellee at 33. Defendants claim that this action was consistent with and authorized by section 34-18-27 and that they were entitled to presume that this statute was valid. Whatever validity this assertion might have were the underlying inspection scheme constitutionally adequate, it cannot serve here to insulate defendants from liability. As we have concluded above, defendants knew

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(Footnote Continued)
particularly since defendants concede that they had no knowledge of any hazardous condition at the Freemans' campground, to outweigh any interests of the State.

or should have known that the statutory inspection scheme was constitutionally deficient. Since defendants were not entitled to search without a warrant and, at the least, should have known this, they hardly can be entitled to assume for purposes of summarily suspending the Freemans' license that a hazardous condition existed when they were refused permission to make that search. Blair publicly conceded that he knew of no statutory or regulatory violations at the campground at the time of his action suspending the license. Although Massa included in his license suspension order the finding required by section 1-26-29, see supra note 10, at 17, nothing appears in the record to support this and therefore his conclusory finding does not alter our determination in this regard. We are convinced that defendants cannot satisfy the

"necessity of quick action" exception to the requirement of a predeprivation hearing. We therefore conclude that the due process requirement of a predeprivation hearing in circumstances such as the ones existing here was "clearly established" at the time and that defendants' claim of immunity should fail on this issue as well.

C.

Finally, although neither party directly addressed the claim in its brief, the complaint asserts that defendants' actions were taken "because of" and "as punishment for" the Freemans' refusal to submit to warrantless searches. Because we believe that this language constitutes a separate claim, we briefly discuss the law dealing with retaliation for the assertion of constitutional rights.

It would seem an elementary proposition that actions taken in retaliation for an

individual's assertion of a constitutional right are impermissible. The Supreme Court in Mount Healthy City Board of Education v. Doyle stated that "[e]ven though [a teacher] could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms." 429 U.S. 274, 283-84 (1977) (citation omitted). Indeed, we believe that "it is well established that an act in retaliation for the exercise of a constitutionally protected right is actionable under Section 1983 even if the act, when taken for a different reason, would have been proper." Buise v. Hudkins, 584 F.2d 223, 229 (7th Cir. 1978), cert. denied, 440 U.S. 916 (1979); see Harrison v. Springdale

Water & Sewer Commission, 780 F.2d 1422, 1428 (8th Cir. 1986). Although this case involves the assertion of a Fourth Amendment right rather than one under the First Amendment, the principle is the same. It is so deeply embedded in the legal and social fabric of our society that no high-level government official could fail to know of it.

IV.

For the reasons stated above, we reverse the decision of the District Court and remand for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 85-5169SD	*	
	*	
Glenn T. Freeman, etc., et al.,	*	Appeal from the United States District Court for the District of South Dakota
	*	
Appellants,	*	
	*	
v.	*	
	*	
Richard W. Blair, etc., et al.	*	
	*	
Appellees.	*	

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby adjudged and decreed that the judgment of the district court is reversed and remanded for further proceedings consistent with the opinion of this Court.

June 4, 1986

Costs taxed in favor of Appellants:

Clerk's docketing fee:	$ 65.00
Costs of main brief:	138.00
Costs of reply brief:	120.00
Total costs of Appellants for recovery from Appellees:	$323.00

A true copy:

ATTEST:

6/25/86

CLERK, U.S. COURT OF APPEALS, 8TH CIRCUIT.

United States District Court
District of South Dakota
CENTRAL DIVISION

Donald J. Porter
U.S. District Judge
Rm. 413 - U.S. Courthouse
Pierre, South Dakota 57501

October 31, 1984

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RE: CIVIL NO. 83-3026
GLENN T. FREEMAN AND LUCY E. FREEMAN, Individually and d/b/a BELVIDERE EAST KOA KAMPGROUND, Plaintiffs
vs.
RICHARD W. BLAIR, Individually and in his capacity as Secretary of Health, State of South Dakota; DOUGLAS E. KLUDT, Individually and in his capacity as Assistant Attorney General, State of South Dakota; MICHAEL J. BAKER, Individually and in his capacity as Assistant Program Director, Department of Health, State of South Dakota, JOHN DOES "A" through "K" whose true names are not known, but are believed to be officers, agents or employees of the State of South Dakota, and LAWRENCE J. MASSA, Individually and in his capacity as Secretary of Health of the State of South Dakota, Defendants

To: Plaintiffs, Pro Se and to Counsel for Defendant

MEMORANDUM OPINION

FACTUAL BACKGROUND

While there is some dispute about some of the accompanying details, the essential facts underlying this case are not controverted. In the summer of 1982, defendants Blair, Secretary of the South Dakota Department of Health, Defendant Baker, an employee of the Department of Health, and Defendant Kludt, an Assistant Attorney General for the State of South Dakota, became engaged in a dispute with plaintiffs involving plaintiffs' campground.[1] Defendants

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[1]The court recognizes that plaintiffs have recently moved to amend their complaint to allege similar actions occurring in September 1984. The defendants' motion for summary judgment does not address those allegations, but taking the allegations as true, the court now takes the view that they

(Footnote Continued)

requested permission to inspect the campground, but plaintiffs refused to allow any inspection without a search warrant. Defendants then suspended plaintiffs' license to operate the campground, and set a hearing for plaintiff to contest the suspension. In making the suspension, defendant Blair made the statement that he knew of no specific violations of regulations at the campground.

DISCUSSION

The gist of defendants' contentions in support of their motion for summary judgment is that, under the principles set forth in Donovan v. Dewey, 452 U.S. 594 (1981); United States v. Biswell, 406 U.S. 311 (1982); and Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) defendants were entitled

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(Footnote Continued)
would withstand a motion for summary judgment for the same reasons given here.

to "inspect" plaintiffs' business premises without a search warrant. Dewey contains the clearest explanation of the search warrant exception urged by defendants. Dewey recognizes that "legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment." 452 U.S. at 598. Dewey hastened to observe, however, that

> warrantless inspections of commercial property may be constitutionally objectionable if their occurrence is so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials.

452 U.S. at 599. Where there are no rules governing the procedures that inspectors must follow, a warrant is usually necessary to assure the owner of "'reasonable legislative or administrative standards for conducting an

. . . inspection are satisfied with respect to a particular [establishment.]'" Id.

The sole legislative authority asserted by defendants for their warrantless inspection is SDCL 34-18-24 and SDCL 34-18-26. At the time of the events alleged in the complaint, SDCL 34-18-24 provided:

> The secretary of health shall periodically inspect or cause to be inspected every lodging establishment and campground operating within this state for compliance with the provisions of this chapter and the rules and regulations of the department of health.

SDCL 34-18-26, in pertinent part, provides that for "the purposes of inspection, the secretary of health shall have the right of entry and access to all areas of the building or structure and property or premise at any reasonable time."

These guidelines are clearly inadequate to provide the safeguards required under Dewey to justify warrantless inspections.

Even accepting the premise that there is a substantial state interest in ensuring that campgrounds be free of health hazards, defendants point to no likelihood that such hazards can be easily concealed, and that a warrant requirement would frustrate enforcement of health regulations. See Dewey, supra, 452 at 603. Additionally, there is no claim that the campground industry has a "notorious history of serious accidents and unhealthful working conditions." Id. In any event, the crucial flaw in defendants' argument is that the statutory guidelines, "in terms of the certainty and regularity of [their] application, [fail to provide] a constitutionally adequate substitute for a warrant." Id. SDCL 34-18-26, setting forth the scope of the inspection, is not limited to campgrounds, but also applies to lodging establishments, food service establishments,

and mobile food service establishments. Thus, the statute, like that struck down in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), "fails to tailor the scope and frequency of such administrative inspections to the particular health and safety concerns posed by the numerous and various businesses regulated by the statute." Dewey, supra, 452 U.S. at 601. Under SDCL 34-18-24, it is provided that the inspections be performed "periodically"; this hardly "specifically defines the frequency of inspection." Dewey, supra,452 U.S. at 604.[2] Further, the scope of the inspection under SDCL 34-18-26, is

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[2]The prior version of SDCL 34-18-24, amended in 1982, provided for "annual" inspections. Plaintiffs claim to have been inspected under this statute only twice between 1970 and 1982. This at least presents a further question as to whether plaintiffs were aware they would be subject to effective inspection.

simply that the Secretary may inspect any part of the premises at "any reasonable time." This is virtually identical to the statute at issue in Marshall v. Barlow's, Inc., that provided that searches "be performed 'at reasonable times, and within reasonable limits and in a reasonable manner.'" Dewey, supra, 452 U.S. at 601. Just as that statute was found to be lacking in "standards to guide inspectors either in their selection of establishments to be searched or in the exercise of their authority to search", Id., so must SDCL 34--18-26 be found to lack the necessary standards.[3] There is, practically speaking,

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[3]The statutes considered in Biswell, supra, and Colonnade Catering Corp., supra, cases relied upon by defendants, both contained considerably more specific standards than those in SDCL 34-18-26. See Biswell, supra, 406 U.S. at 311-312 (entry

(Footnote Continued)

no "predictable and guided . . . regulatory presence" under these statutes. Dewey, supra, 452 U.S. at 604. Finally, unlike Dewey, there is no specific forum provided under the state statutes for a campground owner to show that "a specific search is outside the . . . regulatory authority, or to seek . . . an order accommodating any unusual privacy interests." Dewey, supra, 452 U.S. at 605.

Under these circumstances, this court is unable to accept defendants' arguments that no search warrant was required, and plaintiffs were well within their Fourth Amendment rights to require one. It follows from this that defendants are also not

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(Footnote Continued)
during business hours to inspect business records and firearms); Colonnade Catering Corp., supra, 397 U.S. at 73 n.1,2 (entry only during business hours to inspect business records and liquor.)

entitled to summary judgment on the due process claim arising from the summary suspension of plaintiffs' campground license.

The asserted authority for the suspension of the license was SDCL 34-18-27: the "secretary of health, upon determining the existence of a hazardous condition that may immediately endanger human life or be seriously detrimental to public health may . . . summarily suspend the license of any . . . campground." As noted earlier, defendant Blair made the statement, at the same time that he suspended plaintiffs' license, that he knew of no specific health violations at plaintiffs' campground. Defendants argue that their inability to conduct a warrantless inspection allowed them to assume that a hazardous condition existed. Whatever validity this assumption might have had under different circumstances, the argument cannot succeed here. As this

opinion makes clear, defendants were not entitled to conduct an inspection without a warrant. Thus, the court cannot find, at this time, that defendants had any authority to suspend plaintiffs' license in the manner alleged.

For all these reasons, therefore, defendants' motion for summary judgment is DENIED.

BY THE COURT:

/s/ Donald J. Porter
UNITED STATES DISTRICT JUDGE

United States District Court
District of South Dakota
CENTRAL DIVISION

Donald J. Porter
U.S. District Judge
Rm. 413 - U.S. Courthouse
Pierre, South Dakota 57501

April 25, 1984

Glenn T. Freeman
Lucy E. Freeman
Route 62, Box 108
Midland, South Dakota 57552

Mark Mareno
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501

RE: CIVIL NO. 83-3026
GLENN T. FREEMAN and LUCY E. FREEMAN, Individually and d/b/a BELVIDERE EAST K.O.A., Plaintiffs
vs.
RICHARD W. BLAIR, Individually and in his capacity as Secretary of Health, State of South Dakota; DOUGLAS E. KLUDT, Individually and in his capacity as Assistant Attorney General, State of South Dakota; MICHAEL J. BAKER, Individually and in his capacity a# Assistant Program Director, Department of Health, State of South Dakota; LAWRENCE J. MASSA, Individually and in his capacity as Secretary of Health, State of South Dakota; and MARK V. MEIERHENRY, Individually and in his capacity as Attorney General, State of South Dakota, Defendants.

MEMORANDUM OPINION

CASE SUMMARY

As this court observed in its prior opinion in this case, filed October 31, 1984, the basic facts underlying this litigation are not disputed, and revolve around the moves made by defendants, all officials of the South Dakota Department of Health or the Attorney General's office, to inspect plaintiffs' campground without a search warrant and to suspend its license in 1982 and 1984. In its prior opinion, the court indicated, in denying defendants' first motion for summary judgment, that it then took the view that plaintiffs were entitled to demand a search warrant prior to any inspection, and that defendants could not suspend plaintiffs' license simply because plaintiffs refused a warrantless inspection of their premises. Defendants have moved again for summary judgment, this time

raising, inter alia, the defense of absolute and qualified immunity. Finding that defendants are entitled to such immunity, the court must grant this second motion for summary judgment.[1]

DISCUSSION

As the Supreme Court recently observed in Davis v. Scherer, 82 L.Ed.2d 139, 147 (1984), "[even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the

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[1]Plaintiffs purport to state claims under the sections of the South Dakota state constitution equivalent to the Fourth and Fifth Amendments to the United States Constitution. Plaintiffs cite no authority indicating that standards under the state constitution are of any different nature than those under the federal constitution, and this court will thus make no distinction between the two.

applicable standard." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), puts it this way:

> Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. . . . on summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

See also Tubbesing v. Arnold, 742 F.2d 401 (8th Cir. 1984).

Defendants claim that each of them were performing discretionary functions in performing the acts alleged, and plaintiffs do not appear to contend otherwise. In any event, the acts of deciding whether to

inspect a particular campground for health violations, or to take steps to revoke the license of a particular campground, seem clearly discretionary. See Davis, supra, 82 L.Ed 2d at 151, n.14. Thus, the court turns to the central question on this motion of whether defendants' acts violated clearly established law. The cases cited by plaintiffs, apparently to show the "clearly established law" in 1982 and 1984, are Donovan v. Dewey, 452 U.S. 594 (1981), Marshall v. Barlow's Inc., 436 U.S. 307 (1978); United States v. Biswell, 406 U.S. 311 (1982); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); Camara v. Municipal Court, 387 U.S. 523 (1967); and See v. City of Seattle, 387 U.S. 541 (1967).

Yet, as defendants correctly observe, it is clear under these cases that "legislative schemes authorizing warrantless administrative searches of commercial

property do not necessarily violate the Fourth Amendment," Dewey, supra, 452 U.S. at 598, and whether warrantless inspections are permissible in a given situation "can only be resolved . . . on a case-by-case basis under the general Fourth Amendment standard of reasonableness." See, supra, 387 U.S. at 546. See also Marshall, supra, 436 U.S. at 321 (the "reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute."'. Further, the warrantless inspections here were authorized under the terms of two state statutes, SDCL 34-18-24 and SDCL 34-18-26, which, as a matter of course, must be presumed to be valid, particularly since no court before this one had ever considered their validity. And, as demonstrated by the several pages of citations provided by defendants, see defendants' Memorandum in Support of Motion

for Summary Judgment, filed March 22, 1985, at 12-15, numerous cases from many jurisdictions have upheld warrantless administrative searches under regulatory schemes in a very broad variety of contexts, most involving inspections for potential health and safety hazards such as was the purpose for the inspection attempts here. Given this background, the court is unable to find that it was unreasonable for defendants, in 1982 and September, 1984, to assume that they were entitled to inspect plaintiffs' campground without a search warrant. The fact this court, when the issue was put squarely before it and briefed, may have reached the conclusion, in October, 1984, that the state statutes were insufficiently drawn to authorize warrantless inspections, does not mean that the law was "clearly established" for reasonable persons in

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defendants' position at the times the acts alleged in the complaint were committed.

It follows from this that defendants are also entitled to qualified immunity as to the claim that the license suspensions violated plaintiffs' Fourth Amendments rights. Even as it was reasonable for defendants to conclude that they were entitled to inspect plaintiffs' campground, without a warrant, so was it reasonable to assume that "their inability to conduct a warrantless inspection [for health and safety hazards indicated] that a hazardous condition existed." Freeman v. Blair, No. 83-3026 at 6 (filed October 31, 1984). While defendants' inability to cite a specific hazard in their closure of the campground may, to some extent, have violated the provision of SDCL 34-18-27 that the Secretary of Health "upon determining the existence of a hazardous condition that may immediately endanger human life or be

seriously detrimental to public health may . . . summarily suspend the license of any . . . campground", subject to a requirement of a prompt, post-suspension hearing, this does not change the result. Davis v. Scherer, supra, held that "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision", 82 L.Ed.2d at 149, noting that a contrary result would require public officials

> not only to know the applicable regulations, but also to understand the intent with which each regulation was adopted. Such an understanding often eludes even trained lawyers with full access to the relevant legislative or administrative materials. It is unfair and impracticable to require such an understanding of public officials generally.

It is likewise clear that defendants are fully protected by qualified immunity as to plaintiffs' claims that the suspension of

their license violated their due process rights. It is undisputed that plaintiffs were offered administrative hearings within several days of the license suspensions, as was required by SDCL 34-18-27 and SDCL 1-26-29. Plaintiffs contend that the hearing should have been held prior to the suspensions, but produce no authority that such was constitutionally required.

As Parratt v. Taylor, 451 U.S. 527, 540 (1981), makes quite clear, the courts "have rejected the proposition that 'at a meaningful time and in a meaningful manner' always requires the State to provide a hearing prior to the initial deprivation of property." See, generally, Parratt, supra, 451 U.S. at 537-541. Given this state of the case law and the existence of a presumptively valid statute under which the suspension was made, the court cannot say that plaintiffs have "overcome . . . [defendants'] qualified

immunity . . . by showing that those rights were clearly established at the time of the conduct at issue." Davis, supra, 82 L.Ed.2d at 151.

In any event, the defendants who actually participated in the suspension of the licenses, particularly defendants Blair, Secretary of Health in 1982, and Massa, Secretary of Health in 1984,[2] are entitled to absolute immunity for these acts under Butz v. Economou, 438 U.S. 478 (1978). Butz

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[2]Plaintiffs contend that the rest of the defendants also participated in the license suspensions, but can show no more than the other defendants may have recommended suspension. The power to suspend clearly lay with the Secretary of Health alone, see SDCL 34-18-26, 34-18-27. "There can be no responsibility for the acts of another where there is no authority to control such acts or the persons perpetrating such acts. . . . As the [Secretary of Health] has such responsibility and authority, it is to him, and him alone that the plaintiff must look." Allen v. Fidelity and Deposit Co. of Md., 515 F.Supp. 1185, 1191 (D.S.C. 1981).

makes it clear that prosecutorial absolute immunity is available to officials performing functions "analogous" to those of a prosecutor bringing a criminal prosecution. As Butz stated, speaking of the decision to commence administrative proceedings, the "decision . . . is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought." 438 U.S. at 515. Clearly, the decision by Blair and Massa to suspend plaintiffs' license falls within the type of actions rendered immune by Butz, and thus cannot render them liable for damages here.

It should also be noted that plaintiffs, at an early stage of this litigation, contended that the requirement of a

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campground license somehow violated the Thirteenth Amendment. This claim does not appear in plaintiffs' Third Amended Complaint, filed April 3, 1985, and has apparently been abandoned. The court will therefore not address the portions of defendants' motion on that issue.

For the reasons given, the court grants defendants' motion for summary judgment, and orders that this action be dismissed, with prejudice.

BY THE COURT:

UNITED STATES DISTRICT JUDGE

United States District Court

District of South Dakota

CENTRAL DIVISION

FILED
April 25, 1985
William F. Clayton,
Clerk

GLENN T. FREEMAN and LUCY E. FREEMAN, Individually and d/b/a BELVIDERE EAST K.O.A.,

Plaintiffs

vs.

CIVIL NO. 83-3026
ORDER

RICHARD W. BLAIR, Individually and in his capacity as Secretary of Health, State of South Dakota; DOUGLAS E. KLUDT, Individually and in his capacity as Assistant Attorney General, State of South Dakota; MICHAEL J. BAKER, Individually and in his capacity a# Assistant Program Director, Department of Health, State of South Dakota; LAWRENCE J. MASSA, Individually and in his capacity as Secretary of Health, State of South Dakota; and MARK V. MEIERHENRY, Individually and in his capacity as Attorney General, State of South Dakota,

Defendants.

For the reasons stated in the Memorandum Opinion filed this date, it is

ORDERED that defendants' Motion for Summary Judgment, filed March 22, 1985, is GRANTED, and this action is DISMISSED, with prejudice.

Dated April 25, 1985.

BY THE COURT:

UNITED STATES DISTRICT JUDGE

ATTEST: WILLIAM F. CLAYTON, CLERK

BY:_____
Deputy

(SEAL OF COURT)

APPENDIX B

S.D. Codified Laws Ann. Sec. 34-18-1 (1970)

34-18-1. Definition of terms. Terms used in this chapter, unless the context otherwise requires, mean:

(1) Lodging establishment, any building or other structure and property or premises kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to two or more transient guests.

(2) Transient guest, any person who resides in a lodging establishment less than four consecutive calendar weeks.

(3) Food, any raw, cooked, or processed edible substance, beverage or ingredient used or intended for use or for sale in whole or part for human consumption.

(4) Food service establishment, any fixed restaurant; coffee shop; cafeteria; short-order cafe; luncheonette; grill; tearoom; sandwich shop; soda fountain; tavern bar; cocktail lounge; night club; roadside stand; catering kitchen; delicatessen; bakery; grocery store; boardinghouse; or similar place in which food or drink is prepared for sale or for service to the public on the premises or elsewhere with or without charge.

(5) Temporary food service establishment, any food service establishment which operates at a

fixed location for a temporary period of time, not to exceed two weeks, in connection with a fair, carnival, circus, public exhibition, or similar transitory gathering.

(6) Mobile food service establishment, any mobile unit in which food or drink is prepared for sale or for service to the public with or without charge.

(7) Secretary, the secretary of the state department of health or his authorized representative.

(8) Department, the state department of health.

(9) Owner, the operator, agent, proprietor, manager or licensee whether it be a person, firm, corporation or association.

(10) Rental unit, any room, cabin or other quarters that may be rented to a guest for sleeping accommodations.

(11) Nonprofit organization, any governmental organization, church, fraternal, social, school, youth or other similar organization that is organized and operated for a common good and not for the specific monetary gain of any person or persons.

(12) State fair, the fair at Huron, South Dakota, operated by the department of agriculture.

(13) County fair, any fair or celebration operated by any county of this state and under the supervision of a county fair board, county fair association, or the county board of commissioners.

(14) Campground, a plot of ground for public use upon which two or more campsites are located, established, maintained advertised or held out to the public to be a place where camping units can be locate an occupied as temporary living quarters for children or adults, or both. Camping units are considered to be trailers, tent campers, campers, tents or other equipment that may be used by the traveling public at individual campsites located at campgrounds or areas used by the public as campgrounds.

S.D. Codified Laws Ann. Sec. 34-18-2 (1970)

34-18-2. Secretary responsible for safety and sanitation requirements - Bond not required - Additional compensation not provided. The Secretary of health shall be responsible for carrying out the provisions of this chapter and all other statutes relating to the safety and sanitation of lodging establishments, campgrounds, food service establishments, temporary food service establishments, and mobile food service establishments as defined in this chapter. The secretary shall not be required to give bond, nor shall he receive any additional compensation for such services.

S.D. Codified Laws Ann. Sec. 34-18-3 (1980)

34-18-3. Appointment of food services board - Composition - Terms of office of members. There is created a food services board which shall perform all functions exercised by the former food service advisory council. The board shall assist and consult

with the department in carrying out the administration of this chapter and all amendments thereto relating to food service establishments.

The board shall consist of five members to be appointed by the Governor. Four members shall be providers of food services. The members shall not be all of the same political party. Each member shall hold office for a term of four years, except that any member appointed to fill a vacancy arising from other than the natural expiration of a term shall serve for only the unexpired portion of the term. The terms of members who are first appointed after the effective date of this order shall be: two appointed for a term of one year; two appointed for a term of two years; and one for a term of four years, and such initial terms shall be designated by the Governor.

S.D. Codified Laws Ann. Sec. 34-18-4 (1967)

34-18-4. Meetings of advisory council. The food service advisory council shall meet as frequently as the secretary of health deems necessary but no less than once each year. Upon request by three or more members it shall be the duty of the state department of health to call a meeting of the council.

S.D. Codified Laws Ann. Sec 34-18-6 (1963)

34-18-6. Agreements between secretaries of health and agriculture. The secretary of health is hereby authorized to enter into mutual agreements with the secretary of agriculture in order to promote the mutual effectiveness of both agencies in the area of public health and safety and to prevent

duplication of effort in the promotion of an efficient public health program.

S.D. Codified Laws Ann. Sec. 34-18-7 (1963)

34-18-7. Employment of personnel by secretary - Local health departments as enforcement agents. The Secretary of health shall employ such personnel as are necessary to perform the duties of this chapter. Any county or district health department or municipal health department organized under existing laws may be designated as an agent of the secretary for the purpose of administering the provisions of this chapter and rules and regulations of the department.

S.D. Codified Laws Ann. Sec. 34-18-8 (1970)

34-18-8. Deposit and accounting for money received - Division of money received by local health officer - Expenses paid from appropriations. All money received by the secretary of health in the administration of this chapter shall be receipted and accounted for by the state health department and all money so collected shall be deposited monthly with the state treasurer to the credit of the state general fund. Except that whatever any county or district health department or municipal health department organized under existing laws has been designated as an agent of the secretary as provided by sec. 34-18-7, and such county, district, or municipal health department actually performs the duties of this chapter from which such money is derived, then eighty per cent of such money received by the secretary shall be returned to such county, district, or municipal health department performing such duty or duties, and twenty per cent shall be

deposited monthly with the state treasurer to the credit of the general fund. All expenses incurred by the department resulting from the administration and enforcement of this chapter shall be paid out of funds appropriated by the state legislature for the support of the department.

S.D. Codified Laws. Ann. Sec. 34-18-9 (1977)

34-18-9. License required to operate lodging or food service establishment or campground - Posting in conspicuous place. It is a Class 2 misdemeanor to maintain, conduct or operate a lodging establishment, campground or food service establishment in this state unless a valid license, issued by the department, is in possession of the owner and posted in a conspicuous place in such establishment or campground.

S.D. Codified Laws Ann. Sec. 34-18-10 (1970)

34-18-10. Annual license required. It shall be the duty each year of every owner of a lodging establishment, campground, food service or mobile food service establishment, campground after making proper application on a form provided by the department, accompanied by the proper license fee.

S.D. Codified Laws Ann. Sec. 34-18-11 (1980)

34-18-11. Annual fees for food service and lodging establishment licenses. The annual license fee for a food service establishment or a lodging establishment shall be established by the department of health through rules adopted pursuant to chapter 1-26.
SD Codified Laws Ann. Sec. 34-18-1.11 (1980)

34-18-11.1. Annual campground license fee. The annual license fee for a campground shall be established by the department of health through rules adopted pursuant to chapter 1-26.

S.D. Codified Laws Ann. Sec. 34-18-12 (1963)

34-18-12. Penalty for delinquency in applying for license. Any owner submitting a license application to the department after the first day of August each year or after thirty days of operation of the establishment or campground shall be subject to a penalty equal to one-half of the applicable license fee.

S.D. Codified Laws Ann. Sec. 34-18-13 (1970)

Reduced license fee for less than half of year. A reduced license fee in the amount of one-half the applicable annual license fee and any penalty chargeable because of a delay in making license application shall be charged for new lodging establishments, campgrounds, and food service establishments beginning operations after the first day of January each year and for changes in ownership and location of such existing establishments and campgrounds after the first day of January each year.

S.D. Codified Laws Ann. Sec. 34-18-14 (1970)

34-18-14. Issuance of license when establishment in compliance. After having received a properly completed application form and the correct license fee, together with any penalty applicable, and after satisfying himself that the establishment or campground is in compliance with the

provisions of this chapter and the rules and regulations of the department, the secretary of health shall issue a license to such establishment or campground.

S.D. Codified Laws Ann. Sec. 34-18-15 (1970)

34-18-15. Expiration of license - New license required on change in ownership or location. A license issued pursuant to Sec. 34-18-14 shall expire on the thirtieth day of June each year and shall not be transferable from owner to owner or from location to location of the establishment or campground. Changes in ownership or location shall require the purchase of a new license which may be secured by making proper application on a form provided by the department and the payment of the proper license fee.

S.D. Codified Laws Ann. Sec. 34-18-16 (1972)

34-18-16. Mobile food service license fee. The annual license fee for a mobile food service establishment shall be twenty-five dollars.

S.D. Codified Laws Ann. Sec. 34-18-17 (1972)

34-18-17. Temporary food service license - Fee - Food service in connection with special promotions - Duration of license. It shall be the duty of each owner of a temporary food service establishment to secure a license before beginning the operation of such establishment after making proper application on a form provided by the department and accompanied by the proper license fee. The license fee for a temporary food service establishment shall be twenty-five dollars.

Those business which offer food at no cost or consideration not more than three times in any calendar year and no more than three consecutive days at any given time in conjunction with a grand opening, promotion or special product, showing shall be exempt from the licensing and license fee provisions does not release the owner of such establishments from compliance with the public health requirements of this chapter and the rules and regulations of the department. After having satisfied himself that such temporary food service establishment is in compliance with this chapter and the rules and regulations of the department, the secretary of health shall issue a license for thirty days from the date of issuance.

S.D. Codified Laws Ann. Sec. 34-18-18 (1963)

34-18-18. Fairs and nonprofit organizations exempt from temporary food service license fee - Health requirements applicable. Temporary food service establishments located on the state fairgrounds or on county fairgrounds of this state, operated in conjunction with these annual celebrations, and nonprofit organizations operating a temporary food service establishment shall be exempt from the license fee of this chapter. Such exemption from the license fee does not release the owner of such temporary food service establishment from compliance with the public health requirements of this chapter and the rules and regulations of the department.

S.D. Codified Laws Ann. Sec. 34-18-19 (1972)

34-18-19. Closure order for temporary food service establishment - Operation after closure as violation - Refund of license fee. Should a temporary food service establishment licensed under sec. 34-18-17 not be in compliance with the provisions of this chapter and the rules and regulations of the department and compliance is not considered feasible during the period of the celebration or public gathering where its operation is planned, it shall be the duty of the secretary of health, subject to the requirements of sec. 1-26-29, to issue a closure order to the owner of such temporary food service establishment. Continued operation after notice of closure as rendered by the secretary shall be in direct violation of the licensing requirements of this chapter. Any license fees paid shall be refunded unless the temporary food service establishment has operated for more than one day, the fee paid shall be forfeited by the owner of such temporary food service establishment.

S.D. Codified Laws Ann. Sec. 34-18-20 (1963)

34-18-20. Nonprofit organizations and alcoholic beverage license exempt - Health requirements applicable. Nonprofit organizations shall be exempt from the licensing and license fee provisions of this chapter. Establishments serving alcoholic beverages as defined in chapter 35-1 and who do not otherwise come within the definition of a food service establishment, temporary food service establishment or mobile food service establishment shall be exempt from licensing and license fee provisions of this chapter. Such exemption from the licensing and license fee provisions does not release

the owner of such establishments from compliance with the public health requirements of this chapter and the rules and regulations of the department.

S.D. Codified Laws Ann. Sec. 34-18-21 (1970)

34-18-21. Registration of guests at lodging establishment or campground - Contents and inspection of records. It shall be the duty of every person conducting a lodging establishment or campground to keep and maintain a record of guests. Such a record may be kept in a register or on separate cards and shall be opened for inspection by the secretary of health at any reasonable time. The registry shall contain the name of the guest, the number in the party, the place of permanent residence of the guest, the date of registration, the date of departure, the daily rate charged and the motor vehicle license number of the registrant. These records shall be kept for minimum of three calendar years.

S.D. Codified Laws Ann. Sec. 34-18-22 (1972)

34-18-22. Health and safety requirements - Procedure for rules and regulations. The department shall adopt rules and regulations setting forth the minimum public health and safety requirements for lodging establishments, campgrounds, food service establishments, temporary food service establishments, or mobile food service establishments. The procedure for adopting such rules and regulations shall be in accordance with chapter 1-26.

S.D. Codified Laws Ann. Sec. 34-18-23 (1970)

34-18-23. Notice to department of construction and alteration of establishments. The department shall be notified thirty days prior to initiating construction of new lodging establishments, campgrounds, food service establishments, mobile food service establishments or permanent additions, alterations or modification of existing structures. Owners of temporary food service establishments shall give notice to the department as may be prescribed by the department for any new construction, alteration or modification of existing structures. Such notifications shall be made by the owner for the purpose of permitting a review of features having public health and safety significance.

S.D. Codified Laws Ann. Sec. 34-18-24 (1982)

34-18-24. Departmental inspections of lodging establishments and campgrounds. The secretary of health shall periodically inspect or cause to be inspected every lodging establishment and campground operating within this state for compliance with the provisions of this chapter and the rules and regulations of the department of health.

S.D. Codified Laws Ann. Sec. 34-18-25 (1982)

Departmental inspections of food service establishments. The secretary of health shall inspect periodically or cause to be inspected every food service establishment and mobile food service establishment in this state for compliance with the provisions of this chapter and the rules and regulations of the department of health.

S.D. Codified Laws Ann. Sec. 34-18-26 (1972)

34-18-26. Access to premises for inspection - Notice and correction of deficiencies - Closure order on failure to correct deficiency. For the purpose of inspection, the secretary of health shall have the right of entry and access to all areas of the building or structure and property or premise at any reasonable time. Whenever, upon such inspection, it shall be determined that the lodging establishment, campground, food service establishment or mobile food service establishment is not being conducted or is not equipped and maintained in a manner and condition required by the provisions of this chapter and the rules and regulations of the department, it shall be the duty of the secretary to notify the owner of the lodging establishment, campground, food service establishment, or mobile food service establishment of such changes or alterations which are deemed necessary for complete compliance. It shall thereupon be the duty of the owner to make such changes and alterations as may be necessary to put such lodging establishment, campground, food service establishment, or mobile food service establishment in a condition that will comply with the provision of this chapter and rules and regulations of the department. If, after proper notice to the owner, he refuses or fails to comply within sixty days following notification, it shall be the duty of the secretary, subject to the requirements of chapter 1-26, to issue a closure order to the owner of said lodging establishment, campground, food service establishment, or mobile food service establishment and such requirements are complied with. Should the establishment

continue operation, then the secretary shall refer the matter to the state's attorney for appropriate action.

S.D. Codified Laws Ann. Sec. 34-18-27 (1972)

34-18-27. Summary suspension of license on discovery of hazardous condition. The secretary of health, upon determining the existence of a hazardous condition that may immediately endanger human life or be seriously detrimental to public health may, subject to the requirements of sec. 1-26-29, summarily suspend the license of any lodging establishment, campground, food service establishment, temporary food service establishment or mobile food service establishment in this state. A license suspended on this basis shall remain suspended until such time as the establishment or campground is into compliance with the requirements of this chapter and the rules and regulations of the department.

S.D. Codified Laws Ann Sec. 34-18-28 (1972)

34-18-28. Request for rehearing on license suspension or revocation or closure order. If the owner of any establishment or campground licensed under this chapter is aggrieved by action taken for suspension or revocation of his license or a closure order he may request a hearing which shall be had and appeal may be taken under the provisions of chapter 1-26 as a contested case. Such request for a hearing shall be a written notice to the secretary of health setting forth the reason or reasons for the grievance.

S.D. Codified Laws Ann. Sec. 34-18-31 (1970)

34-18-31. Precedence over other statutes. The provisions of this chapter shall have precedence over any other statutes relating directly to the safety and sanitary requirements, inspection and licensing of lodging establishments, campground, food service establishments, temporary food service establishments and mobile food service establishments.

S.D. Codified Laws Ann. Sec. 34-18-32 (1977)

34-18-32. Violation of chapter or rules or regulations as misdemeanor - Each day as separate offense. Any lodging establishment, campground, food service establishment, temporary food service establishment or mobile food service establishment owner violating the provisions of this chapter or the rules and regulations adopted pursuant to the chapter shall be guilty of a Class 2 misdemeanor. Each and every day of operation after serving the notice of closure shall constitute a distinct and separate offense.

S.D. Codified Laws Ann. Sec. 34-18-33 (1963)

34-18-33. Severability of provisions. If any provisions of this chapter or the application thereof to anyone or to any circumstance is held invalid, the remainder of the chapter and the application of such provisions to other circumstances shall not be affected thereby.

APPENDIX C

S. D. Codified Laws Ann. sec. 1-26-1 (1982)

1-26-1. Definitions of terms. As used in this chapter, unless the content otherwise plainly requires:

(1) "Agency" means each association, authority, board, commission, committee, council, department, division, office, officer, task force or other agent of the state vested with the authority to exercise any portion of the state's sovereignty. The term does not include the Legislature, the unified judicial system, any unit of local government or any agency under the jurisdiction of such exempt departments and units unless the department, unit or agency is specifically made subject to this chapter by statute;

(2) "Contested case" means a proceeding, including but not restricted to rate-making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing but the term shall not include the proceedings relating to rule-making other than rate-making or student academic or disciplinary proceedings under the jurisdiction of the board of regents;

(3) "License" includes the whole or part of any agency permit, certificate, approval,

registration, charter, or similar form or permission required by law;

(4) "Licensing" includes the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license;

(5) "Party" includes all political subdivisions and agencies of the state;

(6) "Person" includes all political subdivisions and agencies of the state;

(7) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law, policy, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include:

(a) statements concerning only the internal management of an agency and not affecting private rights or procedure available to the public, or

(b) declaratory rules issued pursuant to sec. 1-26-15;

(c) official opinions issued by the attorney general pursuant to sec. 1-11-1;

(d) executive orders issued by the governor;

(e) student matters under the jurisdiction of the board of regents;

(f) actions of the railroad board pursuant to sec. 1-44-28;

(8) "Substantial evidence" means such relevant and competent evidence as a reasonable mind might accept as

being sufficiently adequate to support a conclusion;

(9) "Emergency rule" means a temporary rule that is adopted without a hearing or which becomes effective less than twenty days after filing with the secretary of state, or both.

S. D. Codified Law Ann. sec. 1-26-1 (1983)

1-26-1. Definitions of terms. As used in this chapter, unless the content otherwise plainly requires:

(1) "Agency" means each association, authority, board, commission, committee, council, department, division, office, officer, task force or other agent of the state vested with the authority to exercise any portion of the state's sovereignty. The term does not include the Legislature, the unified judicial system, any unit of local government or any agency under the jurisdiction of such exempt departments and units unless the department, unit or agency is specifically made subject to this chapter by statute;

(2) "Contested case" means a proceeding, including but not restricted to rate-making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing but the term shall not include the proceedings relating to rule-making

other than rate-making or student academic or disciplinary proceedings under the jurisdiction of the board of regents;

(3) "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form or permission required by law;

(4) "Licensing" includes the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license;

(5) "Party" includes all political subdivisions and agencies of the state;

(6) "Person" includes all political subdivisions and agencies of the state;

(7) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law, policy, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include:

(a) statements concerning only the internal management of an agency and not affecting private rights or procedure available to the public, or

(b) declaratory rules issued pursuant to sec. 1-26-15;

(c) official opinions issued by the attorney general pursuant to sec. 1-11-1;

(d) executive orders issued by the governor;

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(e) student matters under the jurisdiction of the board of regents;
(f) actions of the railroad board pursuant to sec. 1-44-28;
(g) prison inmate disciplinary matters under the jurisdiction of the board of charities and corrections.

(8) "Substantial evidence" means such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion;

(9) "Emergency rule" means a temporary rule that is adopted without a hearing or which becomes effective less than twenty days after filing with the secretary of state, or both.

S. D. Codified Laws Ann. sec. 1-26-16 (1966)

1-26-16. Notice and hearing required in contested cases. In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

S.D. Codified Laws Ann. sec. 1-26-17 (1978)

1-26-17. Contents of notice in contested cases. The notice shall include:

(1) A statement of the time, place, and nature of the hearing;
(2) A statement of the legal authority and jurisdiction under which the hearing is to be held;
(3) A reference to the particular sections of the statutes and rules involved;

(4) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished;

(5) A statement of any action authorized by law, which may affect the parties, as a result of any decision made at the hearing, whether it be the revocation of a license, the assessment of a fine or other effect;

(6) A statement that the hearing is an adversary proceeding and that a party has the right at the hearing, to be present, to be presented by a lawyer, and that these and other due process rights will be forfeited if they are not exercised at the hearing;

(7) A statement that the decision based on the hearing may be appealed tot he circuit court and the state Supreme Court as provided by law.

S. D. Codified Laws Ann. sec. 1-26-17.1 (1978)

1.26-17.1. Intervention in contested case by person with pecuniary interests. A person who is not an original party to a contested case and whose pecuniary interests would be directly and immediately affected by an agency's order made upon the hearing may become a party to the hearing by

intervention, if timely application therefor is made.

S. D. Codified Laws Ann. sec.1-26-18 (1978)

1.26-18. Rights of parties at hearings on contested cases. Opportunity shall be afforded all parties to respond and present evidence on issues of fact and argument on issues of law or policy. a party to a contested case proceeding may appear in person or by counsel, or both, may be present during the giving of all evidence, may have reasonable opportunity to inspect all documentary evidence, my examine and cross-examine witnesses, may present evidence in support of his interest, and may have subpoenas issued to compel attendance of witnesses and production of evidence in his behalf.

S. D. Codified Laws Ann. sec. 1-26-18.1 (1976)

1.26-18.1. Trial of contested case by hearing examiner--Proposed findings, conclusions and decision--Agency action--Appeal. Notwithstanding any other provision of law, any agency's contested cases may be tried by a hearing examiner appointed by the agency. The hearing examiner, after hearing the evidence in the matter, shall make proposed findings of fact and conclusions of law, and a proposed decision. the agency may accept, reject or modify said findings and conclusions, and decision, and an appeal may be taken therefrom.

S. D. Codified Laws Ann. sec. 1-26-19 (1972)

1-26-19. Rules of evidence in contested cases. In contested cases:

(1) Irrelevant, incompetent, immaterial, or unduly repetitious evidences shall be excluded. The rules of evidence as applied under statutory provisions and in the trial of civil cases in the circuit courts of this state, or as may be provided in statutes relating to the specific agency, shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under these rules, evidence not otherwise admissible thereunder may be admitted except where precluded by statute if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form;

(2) A party may conduct cross-examinations required for a full and true disclosure of the facts;

(3) Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties

present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the records referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency.

S. D. Codified Laws Ann. sec. 1-26-19.1 (1972)

1-26-19.1. Administration of oaths--Subpoena powers--Witness fees--Disobedience of subpoena. Each agency and the officers thereof charged with the duty to administer the laws of this state and rules of the agency shall have power to administer oaths as provided by chapter 18-3 and to subpoena witnesses to appear and give testimony and to produce records, books, papers and documents relating to any matters in contested cases and likewise issue subpoenas for such purposes for persons interested therein as provided by sec. 15-6-45. Unless otherwise provided by law fees for witnesses shall be as set forth in chapter 19-5 and be paid by the agency or party for whom the witness is subpoenaed.

Failure of a person to obey the subpoena issued pursuant to this chapter may be punished as a contempt of court in the manner provided by chapter 21-34.

S. D. Codified Laws Ann. sec. 1-26-19.2 (1972)

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1-26-19.2. Depositions of witnesses. Each agency and the officers thereof charged with the duty to administer the laws and rules of the agency shall have power to cause the deposition of witnesses residing within or without the state or absent therefrom to be taken or other discovery procedure to be conducted upon notice to the interested person, if any, in like manner that depositions of witnesses are taken or other discovery procedure is to be conducted in civil actions pending in circuit court in any matter concerning contested cases.

S. D. Codified Laws Ann. sec. 1-26-20 (1966)

1-26-20. Agreed disposition of contested cases. Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default.

S. D. Codified Laws Ann. sec. 1-26-21 (1972)

1-26-21. Contents of record in contested cases. The record in a contested case shall include:

(1) All pleadings, motions, intermediate rulings;
(2) Evidence received and considered;
(3) A statement of matters officially noticed with have been refuted;
(4) Questions and offers of proof, objections, and rulings thereon;
(5) Proposed findings and exceptions;
(6) Any decision, opinion, or report by the officer presiding at the hearing;
(7) All staff memoranda or data submitted to the hearing officer or members of the agency in connection

with their consideration of the case.

S. D. Codified Laws Ann. sec. 1-26-22 (1978)

1-26-22. Transcript in contested cases--Minutes in lieu of transcript. Whenever a party requests in writing that oral proceedings be transcribed, a verbatim record of all proceedings and testimony shall be kept by the agency . Unless otherwise provided by law the agency shall not be required to transcribe the record unless the requesting party tenders and pays the reasonable cost thereof. If transcribed, a copy of the record shall be furnished to any other party to the hearing at the request and expense of such other party. If no verbatim record is transcribed, the agency shall prepare minutes of the hearing. the minutes shall consist of a written summary of the evidence and proceedings.

S. D. Codified Laws Ann. sec. 1-26-23 (1966)

1-26-23. Basis for findings in contested cases. Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

S. D. Codified Laws Ann. sec. 1-26-24 (1972)

1-26-24. Tentative or proposed decision served on parties--contents--Waiver. When in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a tentative or proposed decision is served upon the

parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision. The tentative or proposed decision shall contain a statement of the reasons therefor and findings of fact on each issue and conclusions of law necessary to the proposed decision, prepared by the person who conducted the hearing or one who has read the record. The parties by written stipulation may waive compliance with this section.

S. D. Codified Laws Ann. sec. 1-26-25 (1978)

1-26-25. Form, contents and notice of decisions, orders and findings. A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. It may affirm, modify, or nullify action previously taken or may direct the taking of new action within the scope of the notice of hearing. It shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed finding of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

S. D. Codified Laws Ann. sec. 1-26-26 (1975)

1-26-26. Ex parte consultations by agency personnel--Investigating officer disqualified from decision on hearing--Authorized communications. Unless required for the disposition of ex parte matters authorized by law, members of the governing board or officers or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. If one or more members of a board or commission or a member or employee of an agency, who is assigned to render a decision in a contested case, took part in an investigation upon which the contested case is based, he shall not participate in the conduct of the hearing nor take part in rendering the decision thereon, but he may appear as a witness and give advice as to procedure. If, because of such disqualification, there is no person assigned to conduct the hearing or render the decision, the agency shall appoint someone pursuant to sec. 1-26-18.1 to fulfill those duties. A person assigned to render a decision:

(1) May communicate with other members of the agency, and

(2) May have the aid and advice of one or more personal assistants.

S. D. Codified Laws Ann. sec. 1-26-27 (1973)

1-26-27. License proceeding treated as contested case. When the grant, denial or renewal of a license is required to be

preceded by notice and opportunity for hearing, or an applicant, a party or an agency requests a hearing, the provisions of this chapter concerning contested cases apply.

S. D. Codified Laws Ann. sec. 1-26-28 (1966)

1-26-28. Existing license extended during renewal proceedings. When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire, until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

S. D. Codified Laws Ann. sec. 1-26-29 (1966)

1-26-29. Notice and hearing required for revocation or suspension of license--Emergency suspension. No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively require emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or

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other action. These proceedings shall be promptly instituted and determined.

S. D. Codified Laws Ann. sec. 1-26-30 (1978)

1-26-30. Right to judicial review of contested cases--Preliminary agency actions. A person who has exhausted all administrative remedies available within any agency or a party who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. If a rehearing is authorized by law or administrative rule, failure to request a rehearing will not be considered a failure to exhaust all administrative remedies and will not prevent an otherwise final decision from becoming final for purposes of such judicial review. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, or relief, when provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

S. D. Codified Laws Ann. sec. 1-26-30.1 (1975)

1-26-30.1. Right of appeal when agency fails to act in contested case. The failure of any agency to make and file a decision within a period of thirty days after any matter has been finally submitted to it, shall entitle a person authorized to appeal from the record then existing the same as if the decision had been made adversely to him in whole or in part, unless within such time the agency shall make and serve upon all the parties to the record, an order extending

such time for an additional period of not to exceed sixty days, which order shall state the grounds or reasons why such extension is necessary. At the expiration of said thirty days or the time to which extended by such order, such person may present to the agency a proposed decision, and if the same be not adopted within five days after presentation for filing, such person may appeal the same as if such proposed decision had been denied. This section shall not apply to contested cases determined by the public utilities commission.

S. D. Codified Laws Ann. sec. 1-26-30.2 (1975)

1-26-30.2. Appeal from final action in contested case. An appeal shall be allowed in the circuit court to any party in a contested case from a final decision, ruling or action of an agency.

S. D. Codified Laws Ann. sec. 1-26-30.3

1-26-30.3. Conduct of appeals. Notwithstanding any other provision of law, all appeals authorized by sec 1-26-30.1 or sec. 1-26-30.2 shall be taken and conducted pursuant to the provisions of this chapter.

S. D. Codified Laws Ann. sec. 1-26-30.4 (1982)

1-26-30.4. Scope of sections on appeals to circuit courts. The sections of this chapter on appeals to circuit courts shall govern civil appeals to the circuit courts of South Dakota from final decisions, rulings or actions of agencies pursuant to chapter 1-26.

S. D. Codified Laws Ann. sec. 1-26-30.5 (1982)

1-26-30.5. Suspension of sections on appeals to circuit courts. In the interest of expediting decisions in cases of pressing concern to the public or to litigants, or for good cause shown, the circuit court may suspend the requirement or provisions for these rules on application of a party or on its own motion and may order proceedings in accordance with its direction.

S. D. Codified Laws Ann. sec. 1-26-31 (1979)

1-26-31. Motive of appeal--Time for service and filing. An appeal shall be taken by serving a notice of appeal upon the adverse party and upon the agency which rendered the decision,and by filing te same, or a certified copy, with proof of such service in the office of the clerk of courts of the county in which the venue of the appeal is set, within thirty days after the agency served notice of the final decision or, if a rehearing is authorized by law and is requested, within thirty days after notice has been served of the decision thereon. Service required by this section may be performed by registered or certified mail and is complete when the material to be served is deposited with the United States postal service.

S. D. Codified Laws Ann. sec. 1-26-31.1 (1975)

1-26-31.1. Venue of appeal. The venue of the appeal shall be s follows:

(1) If the appellant is a resident of this state, to the circuit court

for the county of his residence or to the circuit court for Hughes county, as he may elect;

(2) If the appellant is a nonresident or a foreign corporation, to the circuit court for Hughes county;

(3) The parties may stipulate for venue in any county in the state, and the circuit court for such county shall thereupon hear the appeal.

S. D. Codified Laws Ann. sec. 1-26-31.1 (1983)

1-26-31.1. Venue of appeal. The venue of the appeal shall be s follows:

(1) If the appellant is a resident of this state, to the circuit court for the county of his residence or to the circuit court for Hughes county, as he may elect;

(2) If the appellant is a nonresident or a foreign corporation, to the circiut court for Hughes county;

(3) The parties may stipulate for venue in any county in the state, and the circuit court for such county shall thereupon hear the appeal.

Appeals from a single administrative action may not proceed in more than one county. If multiple appels of a single action are filed in more than one county. The appeals shall be consolidated and herd in the county in which the appeal is first filed. If more than one appeal is first filed on the same date and a stipulation among the parties as to venue cannot be reached, the venue of the appeal is in the circuit court for Hughes County.

S. D. Codified Laws Ann. sec. 1-26-31.2 (1977)

1-26-31.2. Contents of notice of appeal. The notice of appeal shall contain the names of the parties and the county to which the appeal is taken; it shall designate in plain and concise language the order or decision from which the appeal is taken; and it shall be dated and signed by the appellant or his attorney.

S. D. Codified Laws Ann. sec. 1-26-31.3 (1975)

1-26-31.1. Change of venue. The circuit court to which the appeal is first taken may, for convenience of witnesses and production of evidence upon good cause shown and upon such terms or provisions for expense as it may deem reasonable in favor of any party objecting, and on application and notice within five days after the appeal is taken,change the venue to the circuit court for any other county.

S. D. Codified Laws Ann. sec. 1-26-31.4 (1982)

1-26-31.4. Statement of issues on appeal. Within ten days after the filing of the notice of appeal as required by sec. 1-26-31, the appellant, if there are multiple parties to the appeal, shall file with the clerk of the circuit court a statement of the issues he intends to present on the appeal nd shall serve on the other parties a copy of such statement. If any other party wises to raise additional issues on appeal, he shall file an additional statement of issues on appeal

within ten days after service of the appellant's statement.

S. D. Codified Laws Ann. sec. 1-26-32 (1975)

1.26-32. Stay of proceedings on appeal--Time--Granting of further stay, security. The appeal shall operate as a stay of all proceedings under such order or decision for a period of ten days, but shall not operate as a stay for a longer time, unless the court, upon at least three days' notice to the parties and the agency, shall in its discretion order a further stay, pending final decisions of such court. The court, as a condition to granting the further stay, may require the appellant to furnish such security as the court may direct to indemnify the state or agency or any person from loss, damage, or costs through such further stay.

S. D. Codified Laws Ann. sec. 1-26-32.1 (1975)

1.26-32.1. Procedural rules applied. The sections of title 15 relating to practice and procedure in the circuit courts shall apply to procedure for taking and conducting appeals under this chapter so far as the same may be consistent and applicable, and unless a different provision is specifically made by this chapter or by the statute allowing such appeal.

S. D. Codified Laws Ann. sec. 1-26-32.2 (1982)

1-26-32.2. Request for transcript--Waiver by failure to request. Within ten days after the filing of the notice of appeal, the

appellant shall order from the agency or reporter, if present, a transcript of the proceedings such parts thereof as he deems necessary, or a copy of the tape recording of the contested case hearing. The order shall be in writing and a copy thereof shall be served on all parties to the action and a copy shall be filed with the clerk of the circuit court. Failure to order a transcript or a copy of the tape recording within the ten-day period shall constitute a waiver of the right to such transcript or a copy of the tape recording.

If the appellee deems a transcript of other parts of the proceedings necessary or a copy of the tape recording of the contested case hearing, he shall, within ten days after the service of the appellant's request or statement of issues,f file with the clerk of the circuit court and serve upon the appellant a request for a transcript of additional parts to be included in the transcript or a request for a copy of the tape recording of the contested case hearing. Failure to order such additional parts of the transcript or a copy of the tape recording shall constitute a waiver of the right to such additional parts of the transcript or a copy of the tape recording.

S. D. Codified Laws Ann. sec. 1-26-32.3 (1982)

1.26-32.3. Costs of transcript--endorsement of order by reporter--Extension of time for transcript. At the time of ordering a transcript or tape recording of the contested case hearing a party, other than an agency, must make satisfactory arrangements with the agency or reporter, if present, for the payment of the costs of the transcript or the

duplication of the tape recording and all necessary copies. The agency or reporter shall acknowledge at the foot of the order receipt of the request for the transcript or duplicate tape recording and transmit the order to the clerk of the circuit court. If the transcript or duplicate tape recording cannot be completed within thirty days, the agency or reporter shall request an extension of time from the circuit court judge assigned to the appeal and the action of the circuit court judge shall be entered on the record and the parties notified.

S. D. Codified Laws Ann. sec. 1-26-32.4 (1982)

1-26-32.4. form of transcript--Number of copies--Certification. The original transcript or original tape recording of the contested case hearing will be filed with the clerk of the circuit court and copies transmitted to the attorney for each party to the appeal separately represented and directly to any parties not represented. The agency, if a reporter has not been utilized, will make sufficient copies of the tape recording of the contested case hearing and any other items specified in sec. 1-26-21 that are requested and shall transmit copies to the attorney for each party to the appeal separately represented and directly to any parties not represented. In the event that more than three copies of the transcript or of the tape recording and other items as specified in sec. 1-26-21 are necessary to comply with the foregoing requirement, the appellant may make application, upon notice, to the circuit court for an order determining the number of copies to be served and the time of use by the parties. Copies of the

transcript and items specified in sec. 1-26-21 may be reproduced by any duplicating or copying process which produces a clear black image on white paper, if a typewritten transcript is prepared. Copies of the tape recording of the contested case hearing shall be reproduced by any copying process which produces a clear reproduction of the original tape recording in the possession of the agency. The reporter or agency shall certify the correctness of the original and all copies of the transcript or tape recording. The agency or reporter shall notify the clerk of the circuit court in writing that the original transcript or tape recording has been filed and copies transmitted.

S. D. Codified Laws Ann. sec. 1-26-33 (1977)

1-26-33. Record transmitted to circuit court--Limitation of record--Corrections and additions. Within thirty days after the service of the notice of appeal, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

S. D. Codified Laws Ann. sec. 1-26-33.2 (1982)

1-26-33.2. Time for serving briefs. Unless otherwise ordered by the circuit court, the appellant shall serve his brief

within thirty days after the delivery of the transcript of the contested case hearing or delivery of the duplicate tape recording of the contested case hearing or within thirty days after the service of the notice of appeal upon the adverse party, whichever event occurs later. The appellee shall serve his brief within thirty days after the service of the brief of appellant, or in the case of multiple appellants, within thirty days after service of the last appellant's brief. The appellant may serve a reply brief within ten days after service of appellee's brief or in the case of multiple appellees, within ten days after service of the last appellee's brief. Pursuant to sec. 15-6-5(d), briefs shall not be made a part of the record.

S. D. Codified Laws Ann. sec. 1-26-33.3 (1982)

1-26-33.3 Brief of appellant--Contents. The brief of the appellant shall contain under appropriate hearings in the order here indicated:

(1) A jurisdictional statement setting forth the date and the form of the agency decision, ruling or action sought to be reviewed and the date when the notice of appeal was filed with the circuit court.

(2) A concise statement of the legal issue or issues involved omitting unnecessary detail. Each issue shall be stated as an appellate court would state the broad issue presented. Each issue shall be followed by concise statement of how the agency decided it. Any

issue not presented in the brief is deemed waived.

(3) A statement of the case and facts. A statement of the case shall first be presented identifying the agency and indicating briefly the nature of the case and its disposition by the agency. There shall follow a statement of facts relevant to the grounds urged for reversal, modification or other relief.

(4) An argument. The argument shall contain the contentions of the party with respect to the issues presented, the reasons therefor, and the citations to the authorities relied on. Each issue shall be separately presented. Needless repetition shall be avoided.

(5) A short conclusion stating the precise relief sought.

(6) Appendix, if any. Such appendix may include the decision, ruling or action in question and any regulations or any relevant parts to which the parties wish to direct the particular attention of the circuit court.

(7) Request for oral argument, if desire.

S. D. Codified Laws Ann. sec. 1-26-33.4 (1982)

1-26-33.4. Brief of appellee--Contents. The brief of the appellee shall conform to the same requirements as the brief of the appellant, except that the jurisdictional statement, statement of the issues or of the case need not be made unless the appellee is

dissatisfied with the statements made by the appellant. If a notice of review is filed, the appellee's brief shall contain the issues specified in the notice of review and the argument thereon as well s the answer to the brief of the appellant.

S. D. Codified Laws Ann. sec. 1-26-33.5 (1982)

1.26.33.5. Oral argument. Failure of the appellee and the appellant to request oral argument allows a circuit court, at its opinion, to order that no oral argument be taken and the case be submitted for decision solely on the briefs.

S. D. Codified Laws Ann. sec. 1-26-33.6 (1975)

1-26-33.6. Speedy hearing and determination. Upon the filing of the record and other papers in the office of the clerk of the circuit court, it shall be the duty of such court when its attention is called to the matter by the parties, or one of them, immediately to fix a date for hearing, and said cause shall be speedily heard and determined.

S. D. Codified Laws Ann. sec. 1-26-34 (1966)

1-26-34. Additional evidence presented in circuit court. If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is sown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the

additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

S. D. Codified Laws Ann. sec. 1-26-35 (1978)

1-26-35. Nonjury review in circuit court--Proof of irregularities--Argument and briefs. The review shall be conducted by he court without a jury and shall be confined to the record. A trial de novo shall not be granted unless otherwise authorized by law, but in cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

S. D. Codified Laws Ann. sec. 1-26-36 (1978)

1-26-36. Weight given to agency findings--Disposition of case--Grounds for reversal or modification--Findings and conclusions--Costs. The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Clearly erroneous in light of the entire evidence in the record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A court need not enter its own findings of fact and conclusions of law but may affirm, modify or reverse the findings and conclusions entered by the agency as part of its judgment. the circuit court may award costs in the amount and manner specified in chapter 15-17.

S. D. Codified Laws Ann. sec. 1-26-36 (1983)

1-26-36. Weight given to agency findings--Disposition of case--Grounds for reversal or modification--Findings and conclusions--Costs. The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Clearly erroneous in light of the entire evidence in the record; or
(6) Arbitrary or capricious or characterized by abuse of

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discretion or clearly unwarranted exercise of discretion.

A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment. The circuit court may award costs in the amount and manner specified in chapter 15-17.

S. D. Codified Laws Ann. sec. 1-26-37 (1972)

1-26-37. Appeal to supreme Court. An aggrieved party or the agency may obtain a review of any final judgment of the circuit court under this chapter by appeal to the Supreme Court. The appeal shall be taken as in other civil cases.

S. D. Codified Laws Ann. sec. 1-26-36.1 (1982)

1-26-36.1. Appellee's right to obtain review. An appellee may obtain review of a final decision, ruling or action of any agency which may adversely affect him by filing a notice of review with the clerk of the circuit court within twenty days after service of the notice of appeal. The clerk of the circuit court shall not accept for filing such notice of review unless accompanied by proof of service of such notice on all other parties. The notice of review shall specify the decision, ruling or action of the agency to be reviewed.

S. D. Codified Laws Ann. sec. 1-26-37 (1983)

1-26-37. Appeal to supreme Court. An aggrieved party or the agency may obtain a review of any final judgment of the circuit court under this chapter by appeal to the

Supreme Court. The appeal shall be taken as in other civil cases. The Supreme Court shall give the same deference to the findings of fact, conclusions of law and final judgment of the circuit court as it does to other appeals from the circuit court. Such appeal may not be considered de novo.

APPENDIX D

S. D. Codified Laws Ann. sec.21-32-15 (1981)

21-32-15. Liability insurance--Purchase by state. The state of South Dakota, through the commissioner of administration, may obtain and pay for public liability insurance to the extent and for the purposes ~~deemed~~ considered expedient by the commissioner for the purpose of insuring the liability of the state, its officers, agents ~~and~~ or employees.

S. D. Codified Laws Ann. sec.1-32-16 (1981)

21-32-16. Waiver of immunity to extent of insurance coverage--Consent to suit. To the extent such liability insurance is purchased pursuant to sec 21-32-15 and to the extent coverage is afforded thereunder, the state shall be deemed to have waived the common law doctrine of sovereign immunity and consented to suit in the same manner that any other party may be sued.

S. D. Codified Laws Ann. sec. 21-32-17 (1983)

21-32-17. Immunity of state officers, employees and agents. Except as provided in sec. 21-32-16, any employee, officer or agent of the state, while acting within the scope of his employment or agency, whether such acts are ministerial or discretionary, is immune from suit or liability for damages brought against him in either his individual or official capacity.

S. D. Codified Laws Ann. sec. 21-32-18 (1984)

21-32-18. Service on attorney general required for waiver--Judgment void without

service. In order for waiver of sovereign immunity if in sec. 21-32-16 to be effective in an action against a state official, employee or agent; notice of the action shall be given to the attorney general as provided in sec. 15-6-4(d). The attorney general shall within thirty days after the receipt of service, sign and date the admission of service and mail it to the sender. Any judgment rendered in an action involving waiver of sovereign immunity pursuant to sec. 21-32-16 is void unless service has been made as provided herein.

APPENDIX E

CHAPTER 44:02:03
CAMPGROUND ESTABLISHMENTS

44:02:03:01 Definitions. Words defined by SDCL 34-18-1 shall have the same meaning when used in this chapter. In addition, unless the context plainly indicates otherwise, the terms used in this chapter shall mean:

(1) "Designated agent," a municipal, county, or district health department which has been organized under SDCL 34-3 and 9-32-1 and has been designated as an agent of the health officer as provided in SDCL 34-18-7;

(2) "Inspection," an objective investigation of an establishment by the secretary or his authorized representative, using whatever scientific instruments or tools are needed, to determine the health, personnel practices, safety, and sanitary conditions of the establishment in accordance with SDCL 34-18 and rules of the department;

(3) "Sanitary station," a facility used for removing and disposing of wastes from trailer holding tanks along with a water connection for the necessary flushing of the area;

(4) "Service building," a structure housing toilet, lavatory, and any other facilities required by department regulations;

(5) "Service sink," a slop sink with a flushing rim for the disposal of liquid wastes from trailers;

(6) "Sewer connection" the connection consisting of all pipes, fittings, and appurtenances from the drain outlet of the trailer to the inlet of the corresponding sewer riser pipe of the wastewater disposal system serving the travel trailer parking area;

(7) "Sewer riser pipe," that portion of the sewer lateral which extends vertically to the ground elevation and terminates at each trailer space;

(8) "Sink wastes," the liquid waste from sinks, lavatories, and bathing facilities;

(9) "Travel trailer," a vehicular, portable structure built on a chassis, designed to be used as a temporary dwelling for travel, recreational, and vacation uses, permanently identified travel trailer by the manufacturer of the trailer. When factory equipped for the road, it has a body width not exceeding eight feet and a body length not exceeding thirty-two feet;

(10) "Pickup coach," a structure designed to be mounted on a truck chassis for use as a temporary dwelling for travel, recreation, and vacation;

(11) "Motor home," a portable, temporary dwelling to be used for travel, recreation, and vacation, constructed as an integral part of a self-propelled vehicle;

(12) "Camping trailer," a canvas folding structure, mounted on wheels, and designed for travel, recreation, and vacation use;

(13) "tent," a nonvehicular portable shelter used for overnight sleeping made of canvas, strong cloth, or similar material, stretched and sustained by poles, portable frame, ropes or tie-down stakes;

(14) "Other vehicle," any other vehicle or portable structure not defined in subdivisions (10) to (13), but used for recreation and overnight sleeping purposes;

(15) "Dependent trailer," a trailer which is dependent upon a service building for toilet and lavatory facilities;

(16) "self-contained trailer," a trailer which can operate independent of connections to wastewater, water, and electric systems. It contains a water-flushed toilet, lavatory, shower, and kitchen sink, all of which are connected to water storage and wastewater holding tanks located within the trailer;

(17) "Travel trailer parking area," a parcel of land in which two or more spaces are occupied or intended for occupancy by trailers for transient dwelling purposes;

(18) "Trailer space," a parcel of land in a travel trailer parking area for the placement of a single trailer and the exclusive use of its occupants;

(19) "Trailer stand," part of an individual trailer space which has been reserved for the placement of a single trailer and its accessory structures;

(20) "Water connection," the connection consisting of all pipes, fittings, and appurtenances from the water riser pipe to

the water inlet pipe of the distribution system within the trailer;

(21) "Water riser pipe," the portion of the water supply system serving the travel trailer parking area which extends vertically to the ground elevation and terminates at a designated point at each trailer space;

(22) "Watering station," a facility for supplying water storage tanks of trailers with potable water.

44:02:03:02. Condition grounds. The condition of the soil, groundwater level, drainage, and topography shall not create hazards to the property or endanger the health or safety of the occupants. The grounds shall be kept free of rubbish, trash, or debris which could become a safety hazard to the occupants.

44:02:03:03. Soil and ground cover requirements. The growth of brush, weeds, and grass shall be controlled to prevent harborage of ticks, chiggers, and other noxious insects. Parking areas shall be maintained to prevent the growth of ragweed, poison ivy, poison oak, poison sumac, and other noxious weeds considered detrimental to health. Open areas shall be maintained free of heavy undergrowth of any description.

44:02:03:04. Trailer parking space. East trailer space shall contain at least 1,200 square feet of space and have a minimum linear distance of ten feet between adjoining trailers or any fixed building or structure.

44:02:03:05. Density requirement. The density shall not exceed twenty trailer

spaces per acre of gross site area except that the health authority may, under special circumstance,s permit a higher density provided all other environmental, open space, and access requirements of these regulations are adhered to. any person desiring a higher density shall apply for exemption to the health authority, specifying the reasons. the health authority, specifying the reasons. The health authority may issue a letter authorization specifying the location of the parking area and all conditions of the higher density allowance.

44:02:03:06. Setback from public streets. All trailers shall be located at least twenty feet from any parking area boundary line abutting on a public street or highway.

44:02:03:07 Internal streets. Surfaced roadways within a camp site shall be of adequate width to accommodate anticipated traffic and in any case shall meet the following minimum requirements:

(1) One-way, no parking, provided the street is less than 500 feet in total length and serves less than twenty-five trailer spaces: eleven feet;

(2) One-way, no parking: twelve feet;

(3) One-way, parking on one side only: eighteen feet;

(4) Two-way, no parking, provided the street serves less than fifty trailer spaces: eighteen feet;

(5) Two-way, no parking: twenty-four feet;

(6) Two-way, parking on one side only: twenty-seven feet; and

(7) Two-way, parking on both sides: thirty-four feet.

44:02:03:08. Off-street parking and maneuvering space. Each travel trailer parking area shall provide sufficient parking and maneuvering space so that the parking, loading, or maneuvering of trailers incidental to parking shall not necessitate the use of any public street, sidewalk, or right-of-way or any private grounds not part of the travel trailer parking area.

44:02:03:09. Water supply. an accessible, adequate, safe, and potable supply of water shall be provided in each travel trailer parking area. Where a public supply of water of the quantity, quality and pressure approved by the appropriate authority is available, connection shall be made to it and its supply used exclusively. When a public water supply is not available, a private water supply system shall be developed and used as approved by the health authority. An adequate water supply shall be capable of supplying at least fifty gallons per space per day for all spaces lacking individual water connections and at least one hundred gallons per space per day for all spaces provided with individual water connections or a quantity sufficient to meet maximum daily demand. Well heads and well casing openings shall not be in pits, rooms, or spaces that are below ground surface.

44:02:03:10. Water storage and distribution facilities. All water storage reservoirs shall be covered, watertight, and constructed of impervious material. Overflows and vents of such reservoirs shall be effectively screened. Manholes shall be constructed with a raised lip and overlapping covers to prevent the entrance of contaminated material. All water piping,

fixtures, and other equipment shall be constructed and maintained in accordance with state and local regulations and shall be of a type and in locations approved by the health authority. The water piping system shall not be connected with nonpotable or questionable water supplies and shall be protected against the hazards of backflow or backsiphonage. The system shall be designed and maintained to provide a pressure of not less than twenty pounds per square inch under normal operating conditions at service buildings and other locations requiring potable water supply.

44:02:03:11. Watering stations. Each travel trailer parking area shall be provided with one or more easily accessible water supply outlets for filling trailer water storage tanks. Such water supply outlets shall consist of at least a water hydrant and the necessary appurtenances and shall be protected against the hazards of backflow and backsiphonage.

44:02:03:12. Individual water connections. When facilities for individual water service connections are provided, they shall meet the following requirements:

(1) Riser pipes provided for water service connections shall be located and constructed so that they will not be damaged by the parking of travel trailers;
(2) Water riser pipes shall extend at least four inches above ground elevation; the pipe size shall be at least three-quarters of an inch; and
(3) Adequate provisions shall be made to prevent freezing of service lines, valves, and riser pipes.

44:02:03:13. Wastewater disposal. A safe wastewater collection and treatment system shall be provided in all travel trailer parking areas for conveying and disposing of all wastewater. The system shall be designed, constructed, and maintained in accordance with state and local laws.

44:02:03:14. Sanitary stations. A sanitary station shall be provided consisting of at least a four-inch sewer riser pipe connected to the travel trailer parking area wastewater collection system, surrounded at the inlet end by a concrete apron sloped to the drain, provided with a suitable tight-fitting cover and a water outlet, with the necessary appurtenances, connected to the parking are water supply system to permit periodic washdown of the immediate adjacent areas. Each travel trailer parking area shall be provided with a sanitary station in the ratio of 1 for every 100 dependent trailer spaces or fraction thereof.

44:02:03:15 Individual sewer connections. When facilities for individual sewer connections are provided, they shall meet the following requirements:

(1) The sewer riser pipe shall have at least a four-inch diameter and shall be located on the trailer space so that the sewer connection to the trailer drain outlet will be approximately vertical;

(2) The sewer connection shall have a nominal inside diameter of at least three inches, and the slope of any portion of it shall be at least one-fourth inch per foot. The sewer connection shall consist of one pipeline only without any branch fittings. all joints shall be watertight;

(3) All materials used for sewer connections shall be corrosive resistant, nonabsorbent, and durable. The inner surface shall be smooth;

(4) There shall be a tight-fitting plug or cover for the sewer riser pipe for use when a trailer does not occupy the space; and

(5) Surface drainage shall be diverted away from the riser.

44:02:03:16. Sink wastes. No liquid wastes from sinks shall be discharged onto or allowed to accumulate on the ground surface.

44:02:03:17. Plumbing. All plumbing shall be in accordance with the South Dakota State Plumbing Code. This includes all potable water systems, wastewater collection and treatment, and all other systems subject to the requirements of the state plumbing code.

44:02:03:18. Electrical system. All electrical wiring shall comply with SDCL 36-16 and article 20:44.

44:02:03:19. Repealed.

44:02:03:20. Swimming pools. All swimming pools, wading pools, beaches or other similar recreational facilities shall be constructed, maintained, and operated in accordance with the rules of the department of water and natural resources.

44:02:03:21. Service building. A central service building containing the necessary toilet and other plumbing fixtures specified in sec. 44:02:03:22 shall be provided in travel trailer parking areas which provide parking spaces for dependent trailers.

44:02:03:22. Toilet and bathing facilities. Every campground shall provide in the service building toilets, showers, and lavatories for patron use. Each campground shall provide the following minimum facilities for dependent trailers:

(1) Fifteen or less parking spaces: one men's toilet, one women's toilet, one men's urinal, one men's lavatory, one women's lavatory, one men's shower, and one women's shower;

(2) Sixteen to thirty parking spaces: one men's toilet, two women's toilets, one men's urinal, two men's lavatories, two women's lavatories, one men's shower, and one women's shower;

(3) Thirty-one to forty-five parking spaces: two men's toilets, two women's toilets, one men's urinal, three men's lavatories, three women's lavatories, one men's shower, and one women's shower;

(4) Forty-six to sixty parking spaces: two men's toilets, three women's toilets, two men's urinals, three men's lavatories, three women's lavatories, two men's showers, and two women's showers;

(5) Sixty-one to eighty parking spaces: three men's toilets, four women's toilets, two men's urinals, four men's lavatories, four women's lavatories, two men's showers, and two women's showers; and

(6) Eighty-one to one hundred parking spaces: three men's toilets, four women's toilets, two men's urinals, four men's

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lavatories, four women's lavatories, three men's showers, and three women's showers.

Toilets shall be located in separate compartments equipped with self-closing doors. The shower stalls shall be of the individual type. Hot and cold water shall be furnished to every lavatory, sink, bathtub, and shower and cold water shall be furnished to every water closet and urinal. A service sink with a flushing rim shall be provided for disposal of liquid wastes except where a sanitary station is conveniently accessible.

The facilities required for campgrounds shall be separate from facilities required for other businesses, such as gasoline stations and restaurants, operated in connection with or adjacent to the campground.

44:02:03:23. Structure and cleanliness of service building. All rooms containing sanitary or laundry facilities shall have sound-resistant walls extending to the ceiling between male and female sanitary facilities. Walls and partitions around showers, bathtubs, lavatories and other plumbing fixtures shall be constructed of dense, nonabsorbent, waterproof material or covered with moisture-resistant material. All floors, walls and ceilings in the service building shall be kept in a clean condition and in good repair. There shall be at least one window which can be easily opened or a mechanical device which will adequately ventilate the room.

44:02:03:24. Service building lighting. All service building rooms shall be equipped with nonglare lighting so as to provide a

minimum of ten footcandles on all surfaces except those used for reading, shaving, or the application of cosmetics. For these areas a minimum of twenty footcandles is required.

44:02:03:25. Barbecue pits, fireplaces, stoves, and incinerators. Cooking shelters, barbecue pits, fireplaces, woodburning stoves, and incinerators shall be located, constructed, maintained, and used so as to minimize fire hazard and smoke nuisance both on the property on which used and on neighboring property. No open fire shall be permitted except in facilities provided. No open fire shall be left unattended. No fuel shall be used and no material burned which emits dense smoke or objectionable odors.

44:02:03:26. Garbage and rubbish storage and disposal. The storage, collection, and disposal of refuse in the travel trailer parking area shall create no health hazards, rodent harborage, insect breeding areas, accident or fire hazards, or air pollution. All refuse shall be stored in flytight, watertight, rodent-proof containers, which shall be located not more than 150 feet from any trailer space. Containers shall be provided in sufficient number and capacity to properly store all refuse. All refuse containing garbage shall be collected at least twice weekly. Where suitable collection service is not available from municipal or private agencies, the owner or operator of the travel trailer parking area shall provide this service in a manner approved by the department. All refuse shall be collected and transported in covered leakproof, nonabsorbent vehicles or containers.

44:02:03:27. Insect and rodent control. Grounds, buildings, and structures shall be maintained free of insect and rodent harborage and infestation. Extermination methods and other measures to control insects and rodents shall conform with the requirements of the department or local health authority. Where the potential for insect and rodent infestation exists, all exterior openings in or beneath any structure shall be screened with wire mesh or other suitable materials.

44:02:03:28. Fuel supply and storage. Liquified petroleum gas containers installed on a trailer space shall be securely but not permanently fastened to prevent accidental overturning. Such containers shall not be less than twelve or more than sixty U.S. gallons gross capacity. No liquified petroleum gas vessel shall be stored or located inside or beneath any storage cabinet, carport, trailer, or any other structure, unless such installations are approved by the state department of public safety. All fuel oil storage tanks or cylinders shall be securely fastened in place and shall not be located inside or beneath any trailer or less than five feet from any trailer exit. Storage tanks located in areas subject to traffic shall be protected against physical damage.

44:02:03:29. Fire protection. Portable fire extinguishers of a type approved by the department of public safety shall be maintained in accessible areas for use. Travel trailer parking areas shall be kept free of litter, rubbish, and other flammable materials.

44:02:03:30. Reporting communicable disease. Every owner, operator, attendant, or other person operating a travel trailer parking area shall notify the local health authority immediately of any suspected communicable or contagious disease within the travel trailer parking area.

44:02:03:31. Pet kennels and control of animals. Pet kennels or compounds, if provided, shall be operated and maintained in a clean and sanitary manner. No owner or person in charge of a dog, cat, or other pet animal shall permit it to run at large or to commit any nuisance within the limits of any travel trailer parking area.

44:02:03:32. (Effective through May 31, 1981) Annual license fee. The annual license fee for all campgrounds shall be based on the number of units as follows:

(1) For campgrounds having two but not more than twenty-five, fifteen dollars;
(2) For campgrounds having twenty-six but not more than 100, twenty-five dollars;
(3) For campgrounds having more than 100, thirty-five dollars;
(4) For campgrounds not designating camp units, thirty-five dollars.

(Effective June 1, 1981) Annual license fee. The annual license fee for all campgrounds shall be based on the number of units as follows:

(1) For campgrounds having two but not more than twenty-five, twenty-five dollars;
(2) For campgrounds having twenty-six but not more than 100, forty dollars;

(3) For campgrounds having more than 100, sixty dollars;
(4) For campgrounds not designating camp units, sixty dollars.

CHAPTER 44:02:04 REVERSION OF ESTABLISHMENT FEES

44:02:04:01. Definitions. Words defined by SDCL 34-18-1 shall have the same meaning when used in this chapter. In addition, unless the context plainly indicates otherwise, the terms used in this chapter shall mean:

(1) Repealed;

(2) "Inspection," an objective investigation of an establishment by the secretary of health or his authorized representative, using whatever scientific instruments or tools might be needed, to determine the health, personnel practices, safety, and sanitary conditions of the establishment in accordance with SDCL 34-18 and rules of the department;

(3) "Designated agent," municipal, county, or district health department which has been organized under existing laws;

(4) "Territory," the geographic or political boundary within which the municipal, county, or district health department has by law, regulation, or common practice established jurisdiction of establishments as defined in SDCL 34-18.

44:02:04:02. Inspection forms and frequencies. The inspections shall be recorded on inspection forms provided by the

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department and shall be made at frequencies established by law or department policy. When such frequencies are maintained, additional follow-up or specific item inspections may be made without recording the results on the prescribed inspections forms.

44:02:04:03. Signed agreement. An agreement shall between the secretary of health and the designated agent whenever power is delegated to carry out the duties of SDCL 34-18. All agreements shall be subject to cancellation upon thirty-day written notice given by either party.

44:02:04:04. Duties of designated agent. The designated agent shall carry out all duties of the department outlined in SDCL 34-18 unless modified by contract. The designated agent shall also perform all duties contained in memorandum agreements between the state department of health and other state departments and enforce all regulations, policy memorandums, and interpretations issued by the department relating to SDCL 34-18.

44:02:04:05. Inspections. The designated agent shall inspect at the frequency established in SDCL 34-18 or established by health department policy, all food service establishments, temporary food service establishments, county fairs, nonprofit organizations, alcoholic beverage establishments, and other establishments as defined in SDCL 34-18. The designated agent shall ascertain that all establishments comply with the minimum health standards set by statutes and regulations. Copies of all inspection reports, correspondence or other materials relating to the enforcement of

SDCL 34-18 shall be forwarded to the department weekly.

44:02:04:06. Enforcement of statutes. The designated promote legal or other suitable corrective action whenever any establishment or owner violates SDCL 34-18 or department regulations. The designated agent shall cooperate with the department in all matters relating to health protection and SDCL 34-18.

44:02:04:07. Supplies and resources provided. The department shall provide inspection forms and technical supplies as needed to carry out the duties of SDCL 34-18. This shall not include office equipment, furniture, stationery, or other capital equipment. Copies of all correspondence relating to any establishment in its respective territory shall be furnished to the designated agent. The department shall provide written interpretation or directives in answer to any questions of fact or policy concerning SDCL 34-18.

44:02:04:08. Reversion of fees. The department shall keep a record of all licensed establishments within the territory of each designated agent, along with a record of moneys received from the license fees. The return of moneys pursuant to SDCL 34-18-8 shall be on a semiannual basis.

APPENDIX F

See Donovan v. Dewey, 452 U.S. 594 (1981) (mines); United States v. Biswell, 406 U.S. 311 (1972) (gun dealers); Colonnade Catering Corp. v. United States, 397 U.S. 22 (1970) (liquor); Lovgren v. Byrne, 787 F.2d 857 (3d Cir. 1986) (fishing vessel); Peterman v. Coleman, 764 F.2d 1416 (11th Cir. 1985) (pawnbrokers and dealers in second-hand goods); Rush v. Obledo, 756 F.2d 713 (9th Cir. 1985) (family day care homes); Donovan v. Carolina Stalite Company, 734 F.2d 1547 (D.C. Cir. 1984) (state gravel processing facility); Bionic Auto Parts and Sales, Inc. v. Fahner, 721 F.2d 1071 (7th Cir. 1983) (automotive parts dealers, scrap processors and parts rebuilders); United States v. Kaiyo Maru No. 53, 699 F.2d 989 (9th Cir. 1983) (fishing vessel); Wayne Cusimano, Inc., v. Block, 692 F.2d 1025 (5th Cir. 1982) (produce dealers' records and accounts); United States v. Blue Diamond Coal Co., 667 F.2d 510 (6th Cir. 1981) (coal mine); United States v. Gordon, 655 F.2d 478 (2d Cir. 1981) (insurance company); United States v. Jamieson-McKames Pharmaceuticals, 651 F.2d 532 (8th Cir.), cert. denied, 455 U.S. 1016 (1981) (drug manufacturers); United States v. Raub, 637 F.2d 1205 (9th Cir.), cert. denied, 449 U.S. 922 (1980) (fishing vessels; United States v. Espinosa-Cerpa, 630 F.2d 328 (5th Cir. 1980) (shipping); Frey v. Panza, 621 F.2d 596 (3d Cir.), cert. denied, 449 U.S. 1035 (1980) (houses under construction); United States v. Hilton, 619 F.2d 127 (1st Cir.), cert. denied, 449 U.S. 887 (1980) (shipping); Pollard v. Cockrell, 578 F.2d 1002 (5th Cir. 1978) (massage parlor); Unites States v. Schiffman, 572 F.2d 1137 (5th Cir. 1978) (pharmacy);

United States ex rel. Terraciano v. Montanye, 493 F.2d 682 (2d Cir.), cert. denied, 419 U.S. 875 (1974) (pharmacy); United States Nuclear Regulatory Commission v. Radiation Technology, Inc., 519 F.Supp. 1266 (D.N.J. 1981) (commercial irradiators); United States v. New England Groceries Supply Company, 488 F.Supp 230 (D. Mass. 1980) (grocery store); United States v. Hartley, 486 F. Supp. 1348 (M.D. Fla. 1980), aff'd, 678 F.2d 961 (11th Cir. 1982) (food--government contractors supplying food to military); United States v. Tsuda Maru, 470 F.Supp. 1223 (D. Alaska 1979) (fishing vessels; United States v. Aeri Whole-sale Grocery Co., 409 F.Supp. 529 (S.D. Iowa 1976) (grocery store); United States v. Business Builders, Inc., 354 F.Supp 141 (N.D. Okla. 1973) (food warehouse); United States v. Del Campis Banking Mfg. Co., 345 F.Supp. 1371 (D. Del. 1972) (bakery); Pullin v. Louisiana State Racing Commission, 477 So.2d 683 (La. 1985), on rehrg., 484 So.2d 105 (1986) (race horse stable); Kim v. Dolen, 173 Cal.App.3d 736, 219 Cal.Rptr 248 (4th Dist. 1985) (massage parlor); Exotic Coins, Inc. v. Beacon, ___ Colo ____,699 P.2d 930, appeal dismissed, ___ U.S. ____, 106 S.Ct. 214 (1985) (coin business); Tallman v. Department of Natural Resources, 421 Mich. 585, 365 N.W.2d 724 (1984) (commercial fishing); Louisville Board of Realtors v. City of Louisville, 634 S.W.2d 163 (Ky.App. 1982) (inspection under city housing code prior to rental by landlord of premises); Glenwood TV, Inc. v. Ratner, 103 A.D.2d 322, 480 N.Y.S.2d 98 (1984), aff'd, 65 N.Y.2d 642, 491 N.Y.S.2d 620, cert. denied, ____ U.S. ____, 106 S.Ct. 241 (1985) (licensed television and radio repair business); Mooring v. State, 666 S.W.2d 720 (1984) (liquor store); Moore v. State, 11 Ark. App.

119, 442 So.2d 215 (Fla. 1983) (establishments dealing with salvaged motor vehicle parts); People v. Pace, 101 A.D.2d 336, 475 N.Y.S.2d 443 (1984), aff'd 65 N.Y.2d 684, 491 N.Y.S.2d 684 (1985) (vehicle dismantling business); State v. Kirkland, 655 S.W.2d 140 (Tenn. 1983) (scrap jewelry and metal business); State v. Williams, 8 Kan.App.2d 14, 648 P.2d 1156 (1982) (motor carrier property for hire); Cushing v. Department of Professional Regulation, Board of Dentistry, 416 So.2d 1197 (Fla.App), rev. denied, 424 So.2d 761 (Fla. 1982) (pharmacy); Peterson v. Commonwealth of Pa. State Horse Racing, 68 Pa. Commw. 353, 449 A.2d 774 (1982) (horse race track); In re Martin, 90 N.J. 295, 447 A.2d 1290 (1982) (casino gambling); Marcowitz v. Department of Public Health, 106, Ill. App.3d 422, 435 N.E.2d 1291 (1982) (ambulatory surgical treatment center); State v. Dolce, 178 N.J.Super. 275, 428 A.2d 947 (1981) (racing); In re Department of Environmental Protection, 177 N.J.Super. 304, 426 A.2d 534 (1981) (warrantless inspection of chemical company's waste water treatment facility proper though chemical industry not pervasively regulated, it is sufficient that water pollution is); State v. Norman, 2 Ohio App.3d 159, 441 N.E.2d 292 (1981) (second-hand junk dealer); Kipperman v. State, 626 S.W.2d 607 (Tex. Crim. 1981) (pawn shops); Mendez v. Arizona State Board of Pharmacy, 129 Ariz. 89, 628 P.2d 972 (Arix.App. 1981) (pharmacy); State v. Tindell, 272 Ind. 479, 399 N.E.2d 746 (1980) (auto manufacturer or dealer); State v. Barnett, 389 So.2d 352 (La. 1980) (business of used and second hand property dealer); People v. Woolsey, 90 Cal.App.3d 994, 153 Cal.Rptr. 746 (4th Dist. 1979) (auto business); People v. Easley, 90 Cal.App.3d

440, 153 Cal.Rptr. 396 (2d Dist.), cert. denied, 444 U.S. 899 (1979) (auto repair shop); People v. Firstenberg, 92 Cal. App.3d 570. 155 Cal.Rptr. 80 (2d Dist. 1979), cert. denied, 444 U.S. 1012 (1980) (nursing facility); People v. Tinney, 99 Misc.2d 962, 417 N.Y.S.2d 840 (1979) (auto/salvage business); Hosto v. Brickell, 265 Ark. 147, 577, S.W.2d 401 (1979) (pharmacy); City of Indianapolis v. Wright, 267 Ind. 471, 371 N.E.2d 1298 (Ind. 1978) (massage parlor); Shirley v. Virginia, 218 Va. 49, 235 S.E.2d 432 (1977) (public garage and repair shop); State v. Westside Fish Company, 31 Or.App. 299, 570 P.2d 401 (1977) (fish canner); Olson v. State, 287 So.2d 313 (Fla. 1973) (pharmacy); People v. Curco Drugs, Inc., 76 Misc.2d 222, 350 N.Y.S.2d 74 (1973) (pharmacy); See generally W. Lafave, Search and Seizure, Sec. 10.2 (Supp. 1986).

EDITOR'S NOTE

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NO. 86-364

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RICHARD W. BLAIR, et al.,

Petitioners,

v.

GLENN T. FREEMAN, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Whether the Court below erred in holding that the applicable law, in 1982 and 1984, was "clearly established" so that state officials could reasonably be said to have "known" that an administrative inspection of a licensed commercial establishment, conducted pursuant to a pervasive regulatory scheme, was constitutionally objectionable under the Fourth Amendment to the United States Constitution.

II

Whether the Court below erred in holding that Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 517 (1984) did not apply to bar a procedural due process claim grounded under the Fourteenth Amendment to the United States

Constitution when one state official, in 1982, and another, two years later, failed to follow state statutory procedures governing license suspensions, which provided for due process, and an adequate post-deprivation remedy existed.

III

Whether the Court below erred in holding that the applicable law, in 1982 and 1984 was "clearly established" so that state officials could reasonably be said to have "known" that a pre-deprivation hearing was constitutionally required under the Fourteenth Amendment's Due Process Clause before officials could suspend a commercial establishment license.

IV

Whether the Court below erred in holding that the respective

secretaries of the South Dakota Department of Health were not absolutely immune from suit for their decisions, in 1982 and 1984, to suspend a commercial establishment license.

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Plaintiffs and Respondents, Glenn T. Freeman and Lucy E. Freeman, Pro Se, will be referred to herein as "Respondents" or by name. Defendants and Petitioners Richard W. Blair, Douglas E. Kludt and Michael J. Baker have been parties in this litigation since its beginning. Petitioner Mark V. Meierhenry, was an original party in this litigation, dismissed, then reinstated. Lawrence J. Massa became a party in this litigation in 1984. They will be referred to collectively as Petitioners and individually by last name.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Glenn T. Freeman, Pro Se, on behalf of the Respondents, Glenn T. Freeman and Lucy E. Freeman, respectfully oppose the Petition for a

Writ of Certiorari filed by Mark V. Meierhenry, Attorney General for the State of South Dakota, and Mark A. Moreno, Special Assistant Attorney General for the State of South Dakota, on behalf of the Petitioners to review the opinion of the United States Court of Appeals for the Eighth Circuit in this law suit.

The Questions Presented for Review are at page (i) and (ii) of the Petition for Writ of Certiorari, and restated at page (i) and (ii) of this Opposition.

Parties to the Proceedings in the United States Court of Appeals for the Eighth Circuit are found at page (iii); Statement of Opinions at page (xii); Jurisdictional Statement at pages 1 and 2; and, Petitioner's Statement of the Case is found at pages 4 - 11, all of the Petition for

Writ of Certiorari.

Respondents' Restatement of the Case if found at pages 2 - 13 of this opposition.

The Opinion of the United States Court of Appeals for the Eighth Circuit is found in the Petitioners' Joint Appendix, Pages A-1 to A-49. The judgment of the Court of Appeals, Dated 4 June, 1986, appears in the Joint Appendix at Pages A-49 and A-50.

The opinions of the United States District Court, Central Division, District of South Dakota, denying Petitioners' Summary Judgment, dated 31 October, 1984; and later granting summary judgment on 25 April, 1985, are at Pages A-51 to A-76 in the Petitioners' Joint Appendix.

RESTATEMENT OF THE CASE

Glenn and Lucy Freeman own a small farm in Jackson County, South Dakota, upon which they have operated a campground since 1965 known as Belvidere East K.O.A. (hereinafter Belvidere KOA).

On 27 July, 1982, Petitioner Michael J. Baker, the Assistant Program Director for the South Dakota Department of Health (hereinafter the Department), and another Department employee, William T. Elliott arrived at Belvidere KOA and requested permission to conduct an inspection, citing two sections of South Dakota Codified Laws (SDCL) and the Administrative Rules of South Dakota (ARSD) as their authority to do so without a search warrant. The Respondents refused to allow the

inspection without a warrant, believing there was insufficient statutory and regulatory authority to enforce certain national codes and expressed a fear of a biased inspection. The Department officials departed without further incident.

The following day, Baker wrote a memorandum to Petitioner Richard W. Blair, (then) Secretary of the Department of Health, State of South Dakota, recommending suspension of the Freemans' campground license unless Blair thought a search warrant necessary. Blair contacted Petitioner Mark V. Meierhenry, Attorney General, State of South Dakota for advice. Meierhenry and Petitioner Douglas E. Kludt, an Assistant Attorney General, reviewed the South Dakota statutes and Kludt subsequently met with Blair and advised him that no warrant was

necessary to inspect Belvidere KOA. In the presence of Kludt, Blair then telephoned Glenn Freeman and arranged an appointment for the following morning although Freeman indicated that a search warrant was required prior to inspection.

Shortly after receiving the Blair call, the Freemans began receiving phone inquiries from news media personnel based in Pierre, South Dakota, the point of origin of Blair's call.

On the morning of 30 July, 1982, Blair, Kludt and Baker arrived at Belvidere KOA and in the presence of news media personnel and other witnesses requested permission to conduct an inspection. Glenn Freeman questioned the officials, believing there was insufficient statutory and regulatory authority to enforce certain national codes, refused to

allow an inspection of Belvidere KOA, whereupon, Petitioner Blair served an Order suspending the Respondent's license. The document had been prepared before Petitioner's arrival at the campground.

Immediately following the suspension, and before departing the premises of Belvidere KOA, Blair was interviewed by the press and stated that he wanted to make it ". . . clear that we're not saying there's anything wrong here . . .".

The Freemans posted a notice of the suspension for their patrons and operated for two days on a voluntary donation basis until their attorney had been contacted and the suspension order reviewed.

On or about 2 August, 1982, the Freemans were advised by their attorney that the license suspension

was unlawful. Thereafter, the Freemans resumed normal operation of their campground.

On 4 August, 1982, Respondents were served a notice of hearing, absent a date upon which the hearing was to be held. On 5 August, 1982, an amended notice of hearing was delivered by airplane to the Jackson County sheriff who served it upon the Respondents that evening, noticing them for the first time of hearing scheduled for 9 August, 1982.

On 6 August, 1982, Glenn Freeman called Kludt to complain about the short amount of time in which to prepare prior to the scheduled hearing and to seek an enlargement. During the conversation, Kludt made references to possible criminal prosecution of the Respondents for their failure to submit to a warrantless inspection.

Kludt refused to reschedule the hearing unless all operations at Belvidere KOA ceased. As a result of the adverse on-going publicity arising from the incident which was personally damaging the Freemans and their business experience and other considerations, Respondents, upon being promised unbiased inspectors, consented to permit an inspection.

On 10 August, 1982, an inspection of Belvidere KOA was conducted by Baker and another inspector. The condition of the campground was found favorable, however, Baker's written inspection report to Blair of 12 August, 1982, is inconsistent with his report of inspection made to the Freemans and statements he made on the premises at the time of the inspection.

In March, 1983, the Respondents filed this suit, alleging, inter alia, that their rights under the Fourth, Fifth and Fourteenth Amendments[2] had been violated by state officials. The Respondents named as defendants the State of South Dakota, The South Dakota Department of Health, Governor William Janklow, Meierhenry, Blair, Kludt and Baker. The state of South Dakota and the Department of Health were voluntarily dismissed as parties and the District Court dismissed Janklow and Meierhenry upon Petitioner's Motion[3].

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[2] Violation of Article VI, §§ 1, 2 and 11 of the South Dakota Constitution also was alleged. The appeals court determined that although these claims fall within the ancillary jurisdiction of the federal courts, determination of questions of state law are best left to the district court.

[3] The District Court subsequently reinstated Meierhenry as a party.

The remaining defendants moved for summary judgment, contending that no search warrant was required prior to inspection and that the summary suspension of the campground license was proper. The District Court held that summary judgment was inappropriate because the "plaintiffs were well within their Fourth Amendment rights" to require a search warrant and that the due process claim arising from the summary suspension of the Freemans' license therefore survived. Freeman v. Blair, No. 83-3026, slip op. at 6-7 (D.S.D. 31 Oct. 1984) Appendix A-59.

On 29 August, 1984, two persons who the Freemans did not know, alleging themselves employees of the department of health, however, bearing no credentials to identify them as such, appeared at Belvidere

KOA requesting permission to inspect[4]. The 1982 scenario replayed itself with the Freemans requesting a search warrant and the new secretary of health, Petitioner Lawrence J. Massa, summarily suspending the Freemans' license on the ground that the "public health, safety and welfare imperatively require immediate action", and scheduled a hearing which was postponed until 3 October, 1984. The hearing examiner concluded that "the [South Dakota] statutory authority invested in the Department pursuant to SDCL §§ 34-18-24 and 34-18-26 is insufficient to justify warrantless inspections". Third Amended Complaint, Ex. K. On 20 February, 1985, Massa lifted the

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4 No inspection of Belvidere KOA was requested or conducted in 1983 or 1985. SDCL 34-18-24 required only "periodic" inspections from 1982 to 1986.

license suspension, noting in a letter accompanying the order that "[t]he Department . . . has decided not to exercise its option to appeal the decision and, therefore, is bound by the ruling of the hearing examiner". Third Amended Complaint, Ex. L.

On 22 March, 1985, defendants again moved for summary judgment, claiming absolute and/or qualified immunity. The District Court, reversing its October 1984 decision, granted summary judgment and dismissed the Freemans' complaint with prejudice. The court held that Blair and Massa were entitled to absolute immunity because their decisions were "analagous" to a prosecutor's decision to commence prosecution. Freeman v. Blair, No. 83-3026, slip. op. at 7-7 (D.S.D. 25 April, 1985).

The court also concluded that the remaining defendants were entitled to qualified immunity. Id. at 5-6. The court observed that the Freemans were offered a post deprivation hearing several days following the suspensions and indicated that this comported with the requirements of due process. Id. at 6.

The Freemans appealed the decision of the District Court to the Eighth Circuit Court of Appeals where it was reversed. The court found, inter alia, that the officials were not entitled to qualified or absolute immunity; that the law was clearly established at the time of the incidents; that the Freemans were entitled to a search warrant; and, that the Freemans were entitled to a predeprivation hearing. Further, the

court found that if retaliatory action had been taken against the Freemans for their exercise of constitutional rights, such action would violate clearly established law.

The decision of the District Court was reversed and remanded for further proceedings consistent with the opinion. See Joint Appendix A-1 to A-50, 85-5169SD, 793 F.2d 166.

REASONS FOR DENIAL OF THE WRIT

I

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT PROPERLY FOUND THE LAW CONCERNING RESPONDENTS' RIGHT TO A WARRANT WAS "CLEARLY ESTABLISHED".

Respondents submit that the reasons set forth at pages 11 through 27 of the Petition are insufficient to cause this Court to accept the Petition. It is further submitted that Petitioners misapprehend the legal principles set forth in the Court's

decisions concerning administrative searches and seizures of commercial property. Camara v. Municipal Court, 387 U.S. 523(1967); See v. City of Seattle, 387 U.S. 541(1967); Colonnade Catering Corp. v. United States, 397 U.S. 72(1970); United States v. Biswell, 406 U.S. 311(1972); Marshall v. Barlow's, Inc., 436 U.S. 307(1978); Donovan v. Dewey, 452 U.S. 594(1981).

At issue is the reasonableness of a warrantless inspection of Respondents' premises, the Belvidere East K.O.A. Campground, under South Dakota Codified Laws (SDCL) 34-18-24 and 34-18-26, and the provisions of Administrative Rules of South Dakota (ARSD) 44:02:03, which are set forth in their entirety in the Joint Appendix (JA), at pages A88-89, and A-124 through A-138.

SDCL 34-18-24 requires that:

> "The secretary of health shall periodically inspect or cause to be inspected every . . . campground operating within this state for compliance with the provisions of this chapter and the rules and regulations of the department of health."

SDCL 34-18-26 (JA, Pg. A-89) permits the secretary, for the purpose of inspection:

> ". . . the right of entry and access to all areas of the building or structure and property on premise at any reasonable time."

The Court of Appeals, applying the standards of See, supra; Barlow's, supra; and Donovan v. Dewey, supra, found this broad grant of authority and discretion so unlimited that ". . . the Fourth Amendment and its various restrictive rules apply." Colonnade, 397 U.S. at 77, 90 S.Ct. at 777. (Footnote omitted)". Freeman v. Blair, 793 F.2d 166, 176(8th Cir. 1986). The Court of Appeals further

found that the law was "clearly established" at the time, such that Petitioners knew or should have known of the Respondents' right to demand a search warrant. Ibid.

Petitioners assert that these findings are contrary to this Court's decision in United States v. Biswell, supra, (Pet. Pg. 11), that they conflict with decisions of other federal courts of appeal and state courts of last resort (Id., at 23), and that a writ of certiorari should issue to resolve the matter, together with other cases raising allegedly similar issues. (Id., at 26,27.) A careful reading of Biswell, supra, Donovan v. Dewey, supra, and the decisions of other courts claimed to be conflicting, exposes this assertion to be without merit.

In Biswell, supra, the inspector's

authority was limited to inspections of (1) any records and documents required to be kept by a federally-licensed firearms dealer, and (2) any firearms or ammunition kept or stored by such a dealer, 406 U.S. at 311-312, such inspections to be made "during business hours". Ibid. The Court saw no constitutional difficulty with this authorization, as it furthered an urgent federal interest, the possibilities for abuse and the invasion of privacy were of unimpressive dimensions, and the inspections were a part of a scheme of pervasive regulation. Ibid., at 316-317.

In Donovan v. Dewey, supra, the administrative search provisions of the federal Mine Safety and Health Act of 1977 were found to be a constitutionally adequate substitute

for a warrant because the Act (1) defined the frequency of inspections, (2) set forth the standards for compliance, and (3) accommodated privacy concerns by prohibiting forcible entry, and requiring civil process for injunctive relief upon being refused entry. 452 U.S., at 604-605.

Unlike the narrow, specifically limited inspections authorized in Biswell, supra, and Donovan v. Dewey, supra, the Petitioners herein are authorized to enter ". . . all areas . . . at any reasonable time . . .", for the purpose of inspecting for ". . . compliance with the provision of this chapter and the rules and regulations of the department of health". (SDCL 34-18-24 & 34-18-26, JA, Pgs. A88-89.) Thus, the statutes devolve an almost unlimited discretion on the

Petitioners, leaving Respondents ". . . to wonder about the purposes of the inspector [and] the limits of his task". Biswell, supra, at 316.

In Marshall v. Barlow's, Inc., supra, an equally broad statute was construed as unconstitutional insofar as it authorized inspections without a warrant. 436 U.S., at 325. The Court there declared that:

> The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspections is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. (Footnote omitted.) Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed. (Footnote omitted.) These are important functions for a warrant

> to perform, functions which underlie the Court's prior decision that the Warrant Clause applies to inspections for compliance with regulatory statutes. (Footnote and citations omitted). Ibid., at 323-324.

Beginning with the decision in See v. City of Seattle, supra, (1967) and culminating with Donovan v. Dewey, supra, (1981), this Court has consistently applied the above principles to cases concerning administrative searches of commercial property. During that entire time, one principle has remained fixed: where the legislature has authorized inspection but made no rules governing the procedures that inspectors must follow, the Fourth Amendment and it various restrictive rules apply. See Colonnade Catering Corp. v. United States, supra, at 77 (1970).

The statutes in question clearly authorize inspection but make no rules

governing the inspector's discretion. Therefore, the Court of Appeals correctly determined that the Fourth Amendment applied. Further, as the principles being applied were clearly set forth in this Court's decisions at least as early as 1970, and the principles remained unchanged to the time in question, the Court of Appeals correctly found the law was "clearly established" such that Petitioners knew or reasonably should have known that a warrant was required.

The decisions of other courts which are claimed to be conflicting (Pet. Pgs. 24-26), are readily distinguishable on their facts from the instant case, being cases concerned with pervasive regulatory schemes carried out under statutes properly limiting the inspector's discretion, and protecting the privacy

interests of the owners. An excellent case in point is the Appellate Court of Illinois decision, Marcowitz v. Dept. of Public Health, 106 Ill. App. 3d 422, 62 Ill. Dec. 319, 435 N.E.2d 1291 (1982). There, facilities licensed under the Ambulatory Surgical Treatment Center Act were subject to inspection authorized in writing by the director, at any reasonable time. The inspection includes examining the records and regulations of the facility, and the observation of surgical procedures and patient counseling, if the patient consents. Confidentiality of the medical records was covered by disclosure restrictions in the Act, and administrative and judicial review procedures were in place in the event an inspector was refused entry. Thus, there are clearly distinct differences

between the statutes and circumstances in issue here, and in the cases cited by Petitioners, which defeat Petitioners' claims of conflict.

Further, the cases pending before this Court, which Petitioners contend concern issues present in this case (Pet., Pgs. 26-27), are inapposite. People v. Krull, No. 85-608, revolves around an essentially moot issue, as the law in question has been amended. It concerns narrowly limited matters of consent to search and the validity, for criminal prosecution purpose, of a search conducted in good faith under a regulatory statute later found unconstitutional. See People v. Krull, 107 Ill.2d 107, 89 Ill. Dec. 860, 481 N.E.2d 703, 708-709(1985).

In Anderson v. Creighton, No. 85-5020, the issue is a very narrow immunity question, founded on a claim

that "objectively reasonable" conduct should provide qualified immunity from liability under Harlow v. Fitzgerald, 457 U.S. 800 (1982).

New York v. Burger, No. 86-80, concerns a decision by the Court of Appeals of New York, People v. Burger, 67 N.Y.2d 338, 502 N.Y.S.2d 702 (1986), holding that administrative statutes authorizing warrantless searches are fundamentally defective if used solely to uncover evidence of criminality.

Thus, the principles of law and the facts in this case are distinguishable, easily, from the above. Therefore, as the Court of Appeals correctly applied this Court's prior decisions on administrative searches to the facts in this case, and properly found the law concerning Respondents' right to a warrant was

"clearly established", the Petition for Writ of Certiorari should be denied.

II

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT CORRECTLY DETERMINED THAT PARRATT V. TAYLOR, AND HUDSON V. PALMER HAVE NO APPLICATION TO THE FACTS IN THIS CASE.

On 30 July, 1982, and again on 11 September, 1984, the Petitioners summarily suspended Respondents' campground license for Respondents' refusal to permit warrantless inspections of their premises. Said suspensions are governed by SDCL 1-26-29 (J.A., Pg. A-105) and SDCL 34-18-27 (J.A., Pg. A-90).

SDCL 1-26-29, declares that:

> No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of the facts or conduct which warrant the intended action, and

> the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively require emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

SDCL 34-18-27, states in pertinent part that:

> The secretary of health, upon determining the existence of a hazardous condition that may immediately endanger human life or be seriously detrimental to public health, may, subject to the requirements of § 1-26-29, summarily suspend the license of any . . . campground . . . in the state.

Under this authority, summary suspension is contingent upon the determined existence of a hazardous condition dangerous to human life or detrimental to public health, and a finding that public health, safety, or welfare concerns imperatively require

emergency action.

On 30 July, 1982, Petitioner Blair, then Secretary of Health for the State of South Dakota, personally served Respondent Glenn Freeman with an order summarily suspending the license to operate the Respondents' campground upon Respondents' refusal to consent to a warrantless inspection. Petitioner Blair then admitted to witnesses and news media personnel that he had no knowledge of the existence of any hazardous condition, nor of any statutory violations in the premises.

On 11 September, 1984, following the receipt of a letter from Respondent Glenn Freeman, replying to an earlier letter from the health department requesting consent to inspect, and again refusing consent to warrantless inspection, Petitioner

Lawrence J. Massa [Petitioner Blair's successor in office] summarily suspended Respondents' campground license upon a conclusory finding that the public health, safety, and welfare imperatively required the action.

The Court of Appeals, reviewing Petitioners' claims that these acts were "random and unauthorized", and that prompt post-deprivation relief under South Dakota's common-law tort procedure was adequate for due process pursuant to Parratt v. Taylor, 451 U.S. 527 (1981), and Hudson v. Palmer, 468 U.S. 517 (1984), rejected the claims under the principles recently announced in Pembaur v. City of Cincinnati, _____ U.S. _____, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). (J.A., Pgs. A-41 through A-43.)

The statutory procedure central to determining the process due the

Respondents herein is that set forth in SDCL 1-26-29, which declares that: "No . . . suspension . . . is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license". (J.A., Pg. A-105.)

The only exception to this procedure, which clearly mandates pre-deprivation notice and hearing, is for public health, safety, and welfare emergencies, specifically determined to be dangerous to life and/or detrimental to health, and imperatively requiring "quick action". See Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982). The

Respondents' claim and exercise of their right to demand a warrant authorizing Petitioners' administrative search, as a matter of law, does not qualify as a public health "emergency" under the statutory scheme discussed above.

In the case of Simmons v. United States, 390 U.S. 377 (1968), this Court stated:

> Thus, in this case Garrett was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. Ibid., at 394.

See also, Frost & Frost Trucking v. Railroad Commission, 271 U.S. 583, 593-594 (1926). In the circumstances of this case, the Respondents were entitled to the pre-deprivation "due

process" set forth in SDCL § 1-26-29, to wit: "notice by mail . . . of facts or conduct which warrant the intended action, and . . . an opportunity to show compliance with all lawful requirements . . .". This is Respondents' right, protected against deprivation and denial by the "due process" provisions of the Fourteenth Amendment. Petitioners, Meierhenry, Blair and Massa, heads of their respective agencies and policy makers for their departments, authorized the summary suspension of Respondents' campground license as retaliation and reprisal for Respondents' claim and exercise of their constitutional rights under the Fourth Amendment.

Thus, Parratt, supra, and Hudson, supra, have no application herein, as they concern unauthorized deprivations of property by low-level

state employees, not deliberate deprivations for retaliatory purposes, fully authorized and participated in by the heads of the responsible agencies. Rather, the principles set forth in Pembaur v. Cincinnati, supra, concerning the effect of decisions by policy-making officials, govern this case. The Court of Appeals properly applied these principles, and correctly decided that Parratt, supra, and Hudson, supra, had no application. Therefore, the petition should be denied on this issue.

III

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT CORRECTLY FOUND THE LAW CONCERNING THE RESPONDENTS' RIGHT TO DUE PROCESS WAS CLEARLY ESTABLISHED.

Petitioners disingenuously seek to posture the circumstances as raising a question concerning the "clearly established" state of the law

regarding post-deprivation remedies. (Pet., Pg. 35.) As previously discussed, there is no merit to the position. South Dakota law, at the time in question, required pre-deprivation proceedings for all suspensions, except in those cases of bona fide emergencies, dangerous to life or detrimental to health. (SDCL §§ 1-26-29, 34-18-27; J.A., Pgs. A-90, A-105). Having provided this process by statute, the state cannot deprive the Respondents of this procedural right by reason of the Respondents' exercise of their Fourth Amendment rights. Petitioners have admitted from the beginning that the suspensions of Respondents' campground license were based solely on Respondents' refusals to consent to warrantless inspections of their premises. Thus, the suspensions

deprived the Respondents of their property right without due process, in violation of "clearly established" law.

In Shapiro v. Thompson, 394 U.S. 618 (1969), this Court declared that:

> If a law has no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional. (Citation omitted.)

See also, Dunn v. Blumstein, 405 U.S. 330, 338-343 (1972), (It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution); Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274, 283-284 (1977). Because the suspensions were the result of Respondents' exercise of their Fourth Amendment rights, and not for any emergency, denial of the statutorily mandated pre-deprivation

procedure violated "clearly established" law of which Petitioners knew, or reasonably should have known. Therefore, the Court of Appeals correctly found that Petitioners had no qualified immunity under Harlow v. Fitzgerald, supra, and the Petition for Writ of Certiorari should be denied.

IV

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT CORRECTLY DECIDED PETITIONERS BLAIR AND MASSA WERE NOT ENTITLED TO ABSOLUTE IMMUNITY UNDER BUTZ V. ECONOMOU.

The Petitioners claim that Petitioners Blair and Massa are entitled to absolute immunity for their decisions to summarily suspend Respondents' campground license is frivolous. In Butz v. Economou, 438 U.S. 478 (1978), this Court declared that:

> It makes little sense to hold that a government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority.
>
> * * * * * * * * * * * * * * * * *
>
> . . . Scheuer and other cases have recognized that it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of c l e a r l y e s t a b l i s h e d constitutional limits will not interfere with the exercise of official judgment. We therefore hold that, in a suit for damages arising from unconstitutional action, . . . executive officials exercising discretion are entitled only to the qualified immunity specified in Scheuer, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business. (Footnote Omitted.) Ibid., at 506-508.

The statutory limit on Petitioners' discretion to summarily suspend Respondents' campground license is prescribed in SDCL §§

34-18-27 and 1-26-29. Section 34-18-27 vests the authority in the secretary of the department of health only ". . . upon determining the existence of a hazardous condition that may immediately endanger human life or be seriously detrimental to public health . . .", and subject to the requirement of § 1-26-29, that ". . . the agency finds that public health, safety, or welfare imperatively require emergency action, and incorporates a finding to that effect in its order . . .". (J.A., Pgs. A-90, A-105.)

The constitutional limit is imposed by the Fourth and Fourteenth Amendments, which secure the Respondents the right to refuse a warrantless inspection. Donovan v. Dewey, supra; Marshall v. Barlow's, Inc., supra; See v. City of Seattle,

supra.

The Petitioners admit that they had no knowledge of the existence of any hazardous condition when the Respondents' license was suspended. They likewise admit that the suspensions arose solely from the Respondents' refusals to permit warrantless inspections. Freeman v. Blair, 793 F.2d 166, at 169, n. 1, 177-178, n. 12; J.A., Pgs. A-6, n. 1, A-43-44, n. 12. Thus, Petitioners Blair and Massa, by their orders to summarily suspend the Respondents' campground license, are in the same boat with the official ". . . of higher rank who actually orders a burglary . . ." Butz, supra, at 506. The Court of Appeals correctly determined that, under the circumstances of this case, they were not entitled to absolute immunity.

Therefore, the Petition for Writ of Certiorari should be denied.

V

CONCLUSION

The United States Court of Appeals for the Eighth Circuit has properly applied the principles of this Court's decisions to the issues and facts in this case, and its ruling should not be disturbed. The law concerning the Respondents' constitutional rights was "clearly established" at the time, and Petitioners knew or should have known their conduct would trespass those rights. Therefore, based on the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated this 15 th

day of November, 1986.

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NO. 86-364

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OCTOBER TERM, 1986

RICHARD W. BLAIR, ET AL.,

Petitioners,

v.

GLENN T. FREEMAN AND LUCY E. FREEMAN,

Respondents.

REPLY BRIEF OF PETITIONER'S IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents.

PRELIMNINARY STATEMENT

Throughout this brief, Petitioners will be referred to by name or collectively as Petitioners. Respondents will likewise be referred to by name or collectively as Freemans.

This brief shall address the contentions raised in the Freemans' Brief in Opposition to Petition for Writ of Certiorari dated November 15, 1986, and is being submitted

pursuant to Rule 22 of the Rules of the Supreme Court.

BRIEF COVER

The Freemans incorrectly state in the cover of their opposition brief that the instant certiorari petition is to the United States Court of Appeals for the District of Columbia Circuit instead of to the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

The Freemans' restatement of the case is at times inaccurate and misleading.

Initially, the Freemans in the first full paragraph of page 6 of their opposition brief imply that one or more of the Petitioners contacted the news media concerning the July 30, 1982 rendezvous. To do so, is totally without factual foundation in the record and, more importantly, is contradicted by Glenn Freeman's own deposition testimony.

Furthermore, the Freemans, in the first full paragraph on page 9 of their opposition brief state that they consented to an inspection in 1982 because of "the adverse on-going publicity arising from the incident which was personally damaging [to the Freemans'] business experience and other considerations [and because of] being promised unbiased inspectors." The record, however, indicates that Glenn Freeman consented to an inspection when he was given assurances that he would get an "unbiased" inspector and for this reason alone. In any event, whether Glenn Freeman gave his consent for the reasons he now claims remains to be seen and must be decided, if at all, by finder of fact.

In the second paragraph on page 9, the Freemans assert that "Baker's written inspection report to Blair of 12 August, 1982, is inconsistent with his report of inspection made to the Freemans and

statements he made on the premises at the time of the inspection." This assertion is a misstatement of the record as is the assertion in the first full paragraph of page 11, that the inspectors, in 1984, never produced credentials which identified their employer.

Moreover, the Freemans' statement in the first full paragraph on page 13 of their opposition brief, that the District Court, on April 25, 1985, reversed its October 31, 1984 order denying summary judgment, is both misleading and erroneous. In its April 25, 1985 opinion granting summary judgment, the District Court observed as follows:

> The fact this Court, when the issue was put squarely before it and briefed, may have reached the conclusion, in October, 1984, that the state statutes were insufficiently drawn to authorize warrantless inspections, does not mean that the law was 'clearly established' for reasonable persons in Defendants' position at the times the acts alleged in the complaint were committed.

A-68-69.

REASONS FOR GRANTING THE WRIT

I

QUALIFIED IMMUNITY--FOURTH AMENDMENT ISSUE

At the outset, the Freemans in the first full paragraph of page 16 of their opposition brief misstate the issue raised by the Petitioners in connection with their qualified immunity -- Fourth Amendment argument. As indicated at page i of their Certiorari Petition, the Petitioners seek review of the issue of whether the court below erred in holding that the applicable law, in 1982 and 1984, was "clearly established" so that state officials could reasonably be said to have "known" that an administrative inspection of a licensed commercial establishment, conducted pursuant to a pervasive regulatory scheme, was constitutionally objectionable under the Fourth Amendment to the United States Constitution.

Petitioners reaffirm their argument at pages 11-16 of the Petition, that the Eighth Circuit panel opinion directly conflicts with this Court's teachings in United States v. Biswell, 406 U.S. 311 (1972). In Biswell, this Court upheld an inspection conducted pursuant to § 923(g) of the Gun Control Act of 1968 (18 U.S.C. § 921, et seq.) even though § 923(g) failed to define the frequency or scope of inspection, and in addition, failed to provide any means by which an establishment owner's Fourth Amendment interests could be accommodated. To say, as the Freemans do at pages 19-20 of their opposition brief, that § 923(g) was limited, specific and narrow is erroneous and contrary to any reasonable interpretation of the statute.[1] See Id. at 311-312, 316.

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[1]Notwithstanding Biswell, the Freemans can hardly complain about the certainty and regularity of inspections conducted under

(Footnote Continued)

Just as in Biswell, close scrutiny of public health and safety in campgrounds, restaurants and lodging establishments are undeniably of central importance to state (as well as federal) efforts at preventing health hazards and injuries. Large interests are at stake and inspection is a crucial part of the regulatory scheme, since it assures that the public is protected from disease and injury. It is plain that health and safety inspections of campgrounds, as well as restaurants and lodging establishments pose only limited threats to a licensee's justifiable expectations of privacy. When a person chooses to operate a pervasively

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(Footnote Continued)
§ 34-18-24 of the South Dakota Codified Laws. Prior to 1982, § 34-18-24 provided for "annual" inspections. S.D. Codified Laws Ann. § 34-18-24 (1970). See Supp. A-1. In 1982, the South Dakota legislature amended § 34-18-24 to provide for "periodic" inspections. 1982 S.D. Sess. Laws ch. 261 § 1; S.D. Codified Laws Ann. § 34-18-24 (1982). Glenn Freeman, as a legislator in 1982, voted in favor of the amendment.

regulated business such as a campground, motel or restaurant in South Dakota and to accept a state license, he does so with the knowledge that his business premises will be subject to health and safety inspections. Each licensee is furnished with a revised compilation of regulations that describe his obligations and define the inspector's authority so that he is not left to wonder about the purposes of the inspector or the limits of his task.[2] The licensee, therefore, has no "clearly established" light, in view of Biswell and Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), to demand a warrant and as such, defeat a claim of qualified immunity. See Mitchell v. Forsyth, ___ U.S. ___, 105 S.Ct.

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[2]This is especially so where, as here, the licensee played a strong role in the drafting and passage of the statutes and regulations which make up the regulatory scheme.

2806 (1985); Davis V. Scherer, 468 U.S. 183 (1984); Harlow v. Fitzgerald, 457 U.S. 800 (1982).

Contrary to the Freemans' contentions at pages 22-23 of their opposition brief, the applicable law in 1982 and 1984 was not "clearly established" so that the Petitioners could fairly be said to "know" that a warrant was constitutionally required prior to an inspection. Id. This Court has consistently observed for nearly two decades that warrantless administrative inspections of licensed commercial establishments, made pursuant to a regulatory scheme, are not necessarily violative of the Fourth Amendment and must be resolved on a case-by-case basis under the Fourth Amendment standard of "reasonableness" (i.e., by balancing the state's interests with that of the establishment owner). See v. City of Seattle, 387 U.S. 541, 546 (1967); Colonnade Catering Corp. v. United States, 397 U.S. at

76-77; Marshall v. Barlow's, Inc., 436 U.S. 307, 321 (1978); Donovan v. Dewey, 452 U.S. 594, 598 (1981). Applying this balancing test of reasonableness, the Court has struck down various warrantless administrative inspection schemes, see e.g., See v. City of Seattle, supra; Marshall v. Barlow's, Inc., supra, and upheld others, see e.g., Colonnade Catering Corp. v. United States, supra; United States v. Biswell, supra; Donovan v. Dewey, supra.

The Freeman's claim that the cases cited at pages 24-26 of the Certiorari Petition are readily distinguishable from the instant case because they all involve "pervasive regulatory schemes carried out under statutes properly limiting the inspector's discretion, and protecting the private interests of the owners." In response, the Petitioners submit that the cases cited, including Marcowitz v. Dept. of Public Health, 106 Ill.App.3d 422, 435 N.E.2d 1291 (1982) are in conflict with

the panel opinion and are neither factually nor legally distinguishable from the case at hand.

The Freemans also claim that People v. Krull, No. 85-608 (certiorari granted March 24, 1986, argued, Nov. 5, 1986) (opinion below: Illinois v. Krull, 107 Ill.2d 107, 481 N.E.2d 703 (1985)), Anderson v. Creighton, No. 85-5020 (certiorari granted June 30, 1986) (opinion below: Anderson v. Creighton, 766 F.2d 1269 (8th Cir. 1985)), and New York v. Burger, No. 86-80 (certiorari granted October 6, 1986) (opinion below: People v. Burger, 67 N.Y.2d 338, 502 N.Y.S.2d 702 (1986)) are in apposite. A review of Krull, Creighton, Burger, New York State Restaurant Assn., Inc. v. City of New York, No. 86-581 (appeal filed October 8, 1986) (opinion below: New York State Restaurant Assn., Inc. v. City of New York, 500 N.Y.2d 224 (N.Y. App.Div. 1986)), and Patton v. Sourbeer, No. 86-419 (certiorari filed

September 12, 1986) (opinion below: Sourbeer v. Robinson, 791 F.2d 1094 (3d Cir. 1986), however, reveals that this Court could decide the qualified immunity--Fourth Amendment issue herein raised and is urged, as an alternative reason for granting the writ, to review the decision below for this purpose.[3]

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[3]It is significant to note that this Court granted review in Burger after the lower court opined that the warrantless administrative inspection of a junkyard violated an establishment owner's Fourth Amendment rights, but denied review in Lewis v. McMasters, No. 85-2005 (appeal filed March 24, 1986, appeal dismissed October 6, 1986) (opinion below: Ninth Circuit October 22, 1985) (unpublished)) in the same context after the lower court concluded that the inspection was not violative of the Fourth Amendment. By doing so, the Court has apparently expressed an interest in reviewing the propriety of warrantless administrative inspections of items and merchandise at junkyards and likewise should do the same with respect to health and safety matters at commercial campgrounds.

It should also be noted that the court could decide the qualified immunity--Due Process issue in Creighton and Patton, both of which are are both qualified immunity cases.

II

PARRATT/HUDSON--DUE PROCESS ISSUE

The Freemans contend that this Court's pronouncements in Pembauer v. City of Cincinnati, ___ U.S. ___, 106 S.Ct. 1292 (1986) control the due process issue at hand and that Parratt v. Taylor, 451 U.S. 527 (1981), and Hudson v. Palmer 468 U.S. 517 (1984) have no application. Contrary to the Freemans' contention, Pembauer is in apposite and therefore not controlling here and in addition, was decided some four years after the initial events that gave rise to this action. Moreover, in light of Holloway v. Walker, 86-271 (certiorari filed August 21, 1986) (opinion below: Holloway v. Walker, 790 F.2d 1170 (5th Cir. 1986))[4] the propriety of

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[4]Interestingly, the Petition for Writ of Certiorari in Holloway was filed by Lawrence H. Tribe, the distinguished Harvard law professor, who has apparently undertaken to handle the case before this Court.

the Freemans' contention, as well as the panel opinion, that Parratt and Hudson only apply to low level state officials, is anything but clear. The Court is urged to grant review to resolve this question.

III

QUALIFIED IMMUNITY--DUE PROCESS ISSUE

The Freemans' claim that they have a "clearly established" right to a hearing before an interim license suspension could be imposed. A review of the applicable case law in 1982 and 1984, however, reveals that there was no "clearly established" right to a pre-deprivation hearing for interim license suspensions. See Hudson v. Palmer, supra; Parratt v. Taylor, supra; Barry v. Barchi, 443 U.S. 66 (1979); Mackey v. Montrym, 443 U.S. 1 (1979); Dixon v. Love, 431 U.S. 105 (1977); Mathews v. Eldridge, 424 U.S. 319 (1976).

IV

ABSOLUTE IMMUNITY ISSUE

The Petitioners reaffirm their arguments at pages 37-43 of their Certiorari Petition and pause only to point out that the circumstances surrounding the 1982 and 1984 events and those which surround the Freemans in general, lend strong support to extending absolute immunity to Blair and Massa.[5]

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[5]This is particularly true here when one considers Glenn Freeman's public attacks against state government and state officials, his litigation record against the state, state officials and private businesses, and his efforts to condemn an inspection scheme, which he voted to amend, only nine months after the amended scheme became effective.

CONCLUSION

For these reasons, the Petitioners respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Dated this 8th day of December, 1986.

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SUPPLEMENTAL JOINT APPENDIX

SUPPLEMENTAL JOINT APPENDIX

S.D. Codified Laws Ann. § 34-18-24 (1970).

34-18-24. The secretary of health shall inspect or cause to be inspected every lodging establishment and campground operating within the state for compliance with the provisions of this chapter and the rules and regulations of the department at least annually and in addition thereto may make other inspections as deemed necessary.